No. [redacted] 205

JOHN T. FEY, Clerk

In the

United States Court of Appeals

For the Seventh Circuit

No. 11873

HELEN N. FLEMING, WILLIAM J. NEWMAN, JR., MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOMACANO and WILLIAM McKAVIS, a minor, by HELEN N. FLEMING, his next friend,

Plaintiffs-Appellees,

vs.

LAKE DELTON DEVELOPMENT COMPANY, a Wisconsin Corporation, RALPH M. HINES, JAMES B. HILL, SR., HILMER C. AMUNDSON and HENRY C. TITUS,

Defendants-Appellees,

and

JAMES B. HILL, JR., MILLIE M. RISLEY, FRANCES HINES and A. B. BATTY,

Impleaded Defendants-Appellees,

On Appeal of E. R. BORGMEIER,

Respondent-Appellant.

On Appeal from order entered November 27, 1956, in the District Court for the Western District of Wisconsin.

Honorable Patrick T. Stone, District Judge.

BRIEF AND APPENDIX FOR APPELLANT

E. R. BORGMEIER,
Attorney for Appellant.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11873

HELEN N. FLEMING, WILLIAM J. NEWMAN, JR.; MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOIACANO, and WILLIAM McKAVIS, a minor, by HELEN N. FLEMING, his next friend, Plaintiffs-Appellees, vs. LAKE DELTON DEVELOPMENT COMPANY, a Wisconsin Corporation, RALPH M. HINES, JAMES H. HILL, SR., HILMER C. AMUNDSON and HENRY C. TITUS, Defendants-Appellees, and JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES and A. B. BATTY, Impleaded Defendants-Appellees. On Appeal of E. R. BORGMEIER, Respondent-Appellant.	On Appeal from order entered November 17, 1955, in the District Court for the Western District of Wisconsin. Honorable Patrick T. Stone, District Judge.

BRIEF FOR THE APPELLANT.

STATEMENT OF FACTS.

The facts herein are the same facts presented for consideration in the mandamus and prohibition proceeding filed in this Court, Case No. 11675, entitled "*E. R. Borgmeier, Petitioner,* v. *Honorable Patrick T. Stone,* as Judge of the United States District Court for the Western District of Wisconsin, Respondent", in which proceeding this Court rendered its opinion on May 11, 1956.

On May 21, 1953, respondent as attorney filed the complaint in the court below, on behalf of the heirs of William J. Newman, Sr., of Chicago, Illinois, who died June 2, 1943, to establish a constructive trust in lands, personal property and business enterprises located in Sauk County, Wisconsin, conveyed by William J. Newman and Margaret Y. Newman, his wife, as well as by other nominees of said W. J. Newman, to the Lake Delton Development Company (then known as Lake Delton Hotel Company). These conveyances were made on or about August 1, 1936, in accordance with an order entered in the United States District Court for the Northern District of Illinois, Eastern Division, in a proceeding then pending therein under Section 74 of the Bankruptcy Act, entitled "In the Matter of William J. Newman, Debtor", Case No. 58282. After the entry of the order directing these conveyances, the reorganization proceeding was converted into a straight bankruptcy.

The lands conveyed at that time (exclusive of the personal property and the many and varied business enterprises, and exclusive of the lands and other assets previously conveyed to the nominees) comprised approximately 2300 acres in the Dells area of Wisconsin, and included the lake known as Lake Delton, and were appraised at the close of the calendar year 1936 at the sum of $764,171.00, as is disclosed by the audit of McMurray Smith & Company for the years 1934-1936, withdrawn in accordance with Judge Stone's order of September 21, 1955 (App. 8-9-10). Since that time considerable expansion, improvement and development has been had, and the properties and businesses so conveyed have been enhanced greatly, and undoubtedly doubled, in value.

The plaintiffs agreed to pay the appellant as compensation for her services in connection with said suit

one-half of any recovery had by way of suit, settlement or otherwise, which is the basis of her attorney's charging lien.

The defendants include Mr. Newman's Wisconsin representatives and confidential employees, including the Lake Delton Development Company, his solely-owned corporation; Ralph M. Hines, his Wisconsin manager and president of the Lake Delton Development Company; James H. Hill, Sr., James H. Hill, Jr., and Erma C. Miller, practicing law at Baraboo, Wisconsin, as Hill, Miller & Hill, his Wisconsin attorneys; Hilmer C. Amundson, his Wisconsin engineer; Henry C. Titus, his bookkeeper until 1936; and others. All of the above named defendants, with the exception of Henry C. Titus, remained in such capacity with Mr. Newman until his death, in 1943. All of the defendants in said cause were represented by Arthur Wickham and Erma C. Miller as their attorneys.

The plaintiffs and their spouses included among their number three attorneys, two of whom, Geoffrey Fleming and Edwin Walsh, are actively practicing law at Chicago, Illinois. Said Geoffrey Fleming, the husband of plaintiff Helen N. Fleming, represented Mr. Newman as his attorney in the reorganization and bankruptcy proceedings at Chicago, Illinois, above referred to, and subsequent to respondent-appellant's withdrawal as plaintiffs' attorney, acted as one of the attorneys for plaintiffs.

During the time that respondent-appellant represented plaintiffs as their attorney, she was compelled to devote her entire time and attention to said suit. As a necessary part of such legal services, she removed her domicile to Sauk County, Wisconsin, during the summer of 1953, where among other duties she made complete examinations and duplications of the books and records at the Re-

corder's office of Sauk County, Wisconsin, from 1926 to date. She was likewise compelled to attend numerous pre-trial examinations of the defendants at Madison and Baraboo, Wisconsin, during the winter of 1953-1954. Thereafter by order duly entered by Judge Stone, the defendants deposited with the Clerk of the District Court at Madison ten (10) transfer cases of documents from the offices of the Lake Delton Development companies, and from the law offices of Hill, Miller & Hill, and from the offices of his engineer. There were more than 50,000 of such documents, covering the years 1926-1943, and respondent was obliged to remove her residence and office to Madison, Wisconsin, in order to examine these documents. She examined each of them, and caused them to be numbered for identification, and photostated in excess of 10,000, to be used as evidence in the case. These documents were the basis of her attorney's retaining lien, which was not adjudicated by Judge Stone at any time, but which was called to his attention in affiant's Special and Limited Appearances filed in the trial court on January 3, 1955 (App. 5; 7) and by copies of the itemized account supporting such retaining lien attached to said Special and Limited Appearances (App. 6; 7). The examination, photostating and asembling of these documents required three months of round-the-clock work, and she was also required to employ help in order to accomplish so much in so short a time.

On September 18, 1954, with the approval of Judge Stone by Order entered that day (App. 4) the appearance of Frank M. Coyne was filed in said proceedings as substituted counsel for Clifford G. Mathys as attorney for plaintiffs.

On October 21, 1954, respondent served her notice of motion and written motion on all necessary persons to

withdraw as attorney for plaintiffs, including the plaintiffs and Frank M. Coyne, as attorney for plaintiffs, and the attorneys for defendants (App. 4). The court originally set said motion for hearing on November 4, 1954 (of which date the plaintiffs were notified by respondent—(App. 4), but was thereafter changed to November 3, 1954, without the knowledge of respondent. At the hearing held on respondent's motion (with other motions) on November 3, 1954, the court entered an order permitting respondent to withdraw her appearance as attorney for plaintiffs.

Notice of the entry of said order was forwarded to plaintiffs by respondent on November 9, 1954 (App. 5). Thereafter, on November 22, 1954, respondent filed her withdrawal of appearance as attorney for plaintiffs in accordance with said order entered by Judge Stone on November 10, 1954 (App. 5). The filing of such withdrawal, pursuant to court order, terminated the jurisdiction of the District Court over respondent-appellant, and no jurisdiction was ever thereafter acquired over her by said Court.

On December 7, 1954, Judge Stone entered an ex parte order to show cause against respondent on petition of Geoffrey Fleming, why she should not be compelled to deliver up to plaintiffs or their agents all documents in her possession. Such rule to show cause was never served on her, but she did file her Special and Limited Appearance thereto solely to contest the jurisdiction of the Court (App. 5), and to apprize the court of her attorney's retaining lien in the sum of $10,004.96 (App. 5, 6). Thereafter, on January 25, 1955, Judge Stone entered an ex parte order vacating that portion of his order of November 10, 1954, permitting respondent to withdraw her appearance, and reinstating her as attorney for plaintiffs

and compelling her to present herself to the Court for such further order as is necessary on February 14, 1955 (App. 6); to which order of January 25, 1955 (January 26, 1955) respondent again filed her Special and Limited Appearance seeking solely to contest the jurisdiction of the trial court over her (App. 7); and subsequent to which date Judge Stone entered his order of Februar 15, 1955 (App. 7) reinstating her as attorney for plaintiffs and directing her to deposit with the Clerk of the Court all documents in her possession.

Thereafter respondent filed her Notice of Appeal to this court from the order entered by Judge Stone on February 15, 1955 (Notice of Appeal, (App. 7); and also filed her appeal bond, Designation of Contents, Statement of Points, and Statement in Accordance with Rule 10 (b); all of which are included in the record on appeal herein.

On March 25, 1955, Judge Stone, on the Court's own motion, entered an ex parte order vacating the order from which respondent had appealed, and reinstated his order of November 3, 1954, permitting respondent to withdraw as plaintiff's attorney.

Immediately subsequent to the entry of the order of February 15, 1955, from which respondent prayed an appeal, but prior to the filing of her said Notice of Appeal, respondent forwarded to plaintiffs on February 21, 1955, her bill for legal services rendered in connection with said *Lake Delton* case, showing 3800 hours of legal services rendered at $25.00 per hour, or a total of $95,000.00 (which said bill, with affidavit of mailing, was filed in the trial court on December 21, 1955 (App. 19) for inclusion in the record on appeal herein; that she did also, on February 25, 1955, forward to all of the defendants by

registered mail, return receipt requested, her Notice of Attorney's Lien for services rendered and balance of costs advanced in connection with the *Lake Delton* case, which Notice of Attorney's Lien was filed by her in the trial court on December 13, 1955 (App. 18) to be included in the record on this appeal; that such lien was served upon defendants pursuant to and in accordance with the provisions of Section 256.36 of the Laws of the State of Wisconsin with reference to attorney's lien.

Said cause of *Fleming* v. *Lake Delton Development Co.* was called for trial before Judge Stone on September 20, 1955, and on the day following, was settled between the parties, at which time they entered into a settlement agreement and stipulation dated September 21, 1955, which was approved by Judge Stone (App. 8-9-10), that such stipulation provided that defendants would pay plaintiffs in full of all liability the sum of $32,500.00, in installments of $10,000.00 within 30 days, another $10,000.00 within 60 days, and the balance of $12,500.00 within one year from date of such settlement, all such payments to be deposited with the Clerk of the District Court, and that notice of such settlement be given respondent by James H. Hill, Jr., one of the defendants, "so that the said Miss Borgmeier may take such steps as she may desire to enforce any lien which she may claim or assert herein"; that Mr. Hill duly gave such notice to respondent.

The first payment of $10,000.00 was deposited by the defendants with the Clerk of the Court on October 11, 1955; and the second deposit of $10,000.00 was made November 8, 1955 (App. 12-13).

On November 9, 1955, an ex parte order was entered by Judge Stone, on motion of Frank M. Coyne with supporting affidavit of Geoffrey Fleming, acknowledged at

Chicago, Illinois, on November 8, 1955, directing respondent to appear before the court on November 17, 1955, "and show cause, if any, why the alleged attorney's lien purported to have been filed in the above captioned matter should not be adjudicated or other wise disposed of and upon adjudication of said alleged lien rights, monies now on deposit pursuant to settlement agreement dated September 21, 1955, should not be paid to the plaintiffs"; and that "a copy of this order together with the Petition of Geoffrey Fleming be served upon said Eleanore Borgmeier, Esq., by registered United States Mail with return receipt, said registered mail notice to be sent from the office of the Clerk of the United States District Court * * * said registered mail service to be made on said Eleanore Borgmeier at least ninety-six (96) hours prior to the aforementioned return date. (App. 10, 11).

Such notice was accordingly mailed by the Clerk of the United States District Court, but was not received by Appellant, as is affirmatively shown by the undelivered, unclaimed and unopened envelope so mailed by the Clerk of the Court, and which was returned to him by the United States postal authorities on November 22, 1955.

On November 17, 1955, (on the return of said rule to show cause entered against respondent on November 9, 1955), Judge Stone entered an order determining that "due and sufficient service of said Order to Show Cause upon Eleanor Borgmeier, Esquire, has been effected and that there has been no appearance by her nor by anyone on her behalf and that the Court has jurisdiction to pass upon the aforementioned Order to Show Cause and application for distribution of funds by the plaintiffs," and ordering "that the present sum of $20,000 now on deposit with Edgar Alstad, Clerk of the above captioned District Court, pursuant to settlement agreement of September

21, 1955, be hereby released to the plaintiffs through their attorneys free from any lien of Attorney Eleanore Borgmeier, Esquire." (App. 13-14).

The first knowledge respondent had of the entry of the orders of November 9th and November 17th was on November 20, 1955, when she received by ordinary mail from Frank M. Coyne a copy of the order entered November 17, 1955.

On December 13, 1955, respondent filed her Notice of Appeal to this Court from said order of November 17, 1955, (App. 16) together with her appeal bond (App. 20); and thereafter duly filed her Designation of Contents (App. 22), her Statement of Points on Appeal (App. 20), and Statement in Accordance with Rule 10 (b) (App. 20). She likewise filed a motion (without submitting herself to the jurisdiction of the trial court), to include the original transcripts of proceedings (App. 20).

Thereafter, on motion and affidavits of Frank M. Coyne, Judge Stone did enter orders against respondent on January 2, 1956 (App. 20), and on January 18, 1956, (App. 21), both of which orders were directed to be expunged by the mandate, issued by this court in Case No. 11675, above referred to, being the mandamus proceeding necessarily filed by this affiant to bring this appeal before this court; that by virtue of the mandate of this court so entered, the contents of said orders have become moot upon this appeal.

The record on appeal was filed herein on September 26, 1956, after order of this court entered herein.

SUMMARY OF ARGUMENT.

The trial court ceased to have jurisdiction over appellant on November 19, 1954, at the time she filed her withdrawal of appearance as attorney for plaintiffs, after leave of court first had and obtained. The trial court never re-acquired jurisdiction over her. The trial court was therefore without authority to enter against her its order of November 17, 1954, herein appealed from.

CONTESTED ISSUE.

Did the trial court have jurisdiction over appellant on November 17, 1955, at the time it entered the order appealed from?

PROPOSITIONS OF LAW RELIED ON.

Jurisdiction over the person can only be acquired in one of two ways:

a) By voluntary appearance by defendant (respondent); or

b) Service of process upon him, according to statute.

Robertson v. *Railroad Labor Board*, 268 U.S. 619; 45 S. Ct. 621; 69 L. Ed. 1119.

In the absence of voluntary appearance, service of process must ordinarily be made according to Rule 4 of the Rules of Civil Procedure, except in cases where service must be made in accordance with a special statute. The enforcement of liens or release thereof is controlled by Chapter 28, Section 1655, Lien Enforcement.

Chapter 28, Rule 4, Rules of Civil Procedure.
Chapter 28, Section 1655, Lien Enforcement.
O'Brien v. *Richtarsic*, D.C.N.Y. 1941, 2 F. R. D. 42.

ARGUMENT.

The trial court had no jurisdiction over appellant at the time the order of November 17, 1955, was entered against her.

The principle of law is well established that a court can only acquire jurisdiction over a defendant in one of two ways (*Robertson* v. *Railroad Labor Board*, 1925, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119):

a) By voluntary appearance of the defendant; or

b) By service of process on defendant in accordance with statute.

In the absence of voluntary appearance, the statutory method of service must be complied with. The usual method of service is provided by Rule 4 of the Rules of Civil Procedure and such service over appellant was never attempted. A special statute, (Chapter 28, Section 1655) governs the release of liens, but the service of process provided for therein was never attempted. The order of November 9, 1955, attempting to secure jurisdiction over appellant, provided that service be had upon her by registered mail at least 96 hours prior to November 19, 1955 (App. 10, 11). Such service was likewise never had upon her (App. 15). In fact, no service was ever had upon her. In order to obtain jurisdiction over a party who does not appear voluntarily, service must be had in conformity with statute, or in the absence of statute, in conformity with court order. (*O'Brien* v. *Richtarsic*, D.C.N.Y. 1941, 2 Fed. R. Dec. 42). Unless service is acquired in this fashion, the court does not have jurisdiction over the person.

After appellant had withdrawn her appearance on November 19, 1954, she at no time voluntarily submitted to the jurisdiction of the trial court. Neither was any process of any kind served upon her up to and including November 17, 1955. The service directed by the order of November 9, 1955, was never effected. The trial court therefore had no jurisdiction over her on November 17, 1955, and the Court was without authority to enter its order releasing her attorney's lien from the moneys on deposit with the Clerk of the Court.

That, therefore, the order entered November 17, 1955, should be vacated and set aside and held for naught.

Respectfully submitted,

E. R. BORGMEIER,
Attorney pro se.

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APPENDIX.

STATEMENT PURSUANT TO RULE 16-B.

Complaint was filed May 21, 1953, by appellant as plaintiffs' attorney to establish constructive trust. On September 18, 1954, an order was entered by Judge Stone approving substitution of attorney Frank M. Coyne as resident attorney for plaintiffs in place of Clifford G. Mathys. Notice of motion to withdraw as attorney for plaintiffs was filed by appellant on October 21, 1955, showing notice served on plaintiffs and Frank M. Coyne. On November 10, 1954, Judge Stone entered his order (oral directions on November 3, 1954) permitting appellant to withdraw as plaintiffs' attorney. Notice of said order was given to plaintiffs by appellant. On November 22, 1954, appellant filed her withdrawal of appearance as attorney for plaintiffs.

On December 7, 1954, Judge Stone entered ex parte order against appellant to show cause on January 4, 1955, why she should not return to plaintiffs or their agents all documents in their possession, to which order appellant filed her Special and Limited Appearance on January 3, 1955.

On January 25, 1955, Judge Stone entered ex parte order against appellant to show cause on February 14, 1955, why she should not be reinstated as attorney for plaintiffs, to which order appellant filed her Special and Limited Appearance on February 14, 1955.

On February 15, 1955, Judge Stone entered order vacating withdrawal order of November 10, 1954, and reinstated appellant as plaintiffs' attorney, from which order appellant filed her notice of appeal on February 28, 1955, and thereafter filed her Designation of Contents and Statement

in Accordance with Rule 10 (b), and Statement of Points on Appeal.

On March 25, 1955, Judge Stone entered order vacating the order of February 15, 1955, and reinstating order of November 10, 1954, permitting appellant to withdraw as plaintiffs' attorney.

Case came on for trial on September 20, 1955, and was settled by agreement of the parties on September 21, 1955, as per stipulation filed and approved by Judge Stone on September 21, 1955, providing for payment of $10,000.00 in 30 days, $10,000.00 in 60 days, and $12,500.00 in one year. $10,000.00 was deposited with the Clerk on October 11, 1955, and $10,000.00 was deposited on November 8, 1955.

On November 9, 1955, Judge Stone entered ex parte order against appellant to show cause on November 17, 1955, why her attorney's lien on moneys on deposit should not be released, and provided that notice of entry of said order be given to appellant by Clerk of Court by registered mail, with return receipt, service thereof to be made on appellant at least 96 hours prior to return date. Such notice was never delivered to appellant.

On November 17, 1955, Judge Stone entered order finding that due and sufficient service of said order to show cause has been effected, and no appearance has been had by her or for her, and that the present deposit of $20,000.00 be released to plaintiffs free from any lien of appellant.

On November 22, 1955, there was returned to the Clerk of the District Court at Madison, by the postal authorities at Lemont, Illinois the undelivered, unclaimed and unopened registered letter forwarded by the Clerk on November 9, 1955.

On December 13, 1955, appellant filed her Notice of Appeal from the order of November 17, 1955, together

with attorney's lien served by her upon defendants on February 25, 1955, as per Wisconsin statute, together with appeal bond.

On December 21, 1955, appellant filed her Designation of Contents, Statement of Points on Appeal, Statement in accordance with Rule 10 (b); and copy of bill for legal services forwarded to plaintiffs on February 21, 1955, with affidavits of mailing.

1-7 Complaint in Equity, filed May 21, 1953, by E. R. Borgmeier, as attorney for plaintiffs, stating that on or about to-wit, April 10, 1936, the Lake Delton Hotel Company (now known as Lake Delton Development Company) a Wisconsin corporation, by an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, became the nominal purchaser of all of the right, title, interest and equity of William J. Newman, Sr., in and to all real estate owned by him in Sauk County, Wisconsin, and more particularly located in Sections 9, 10, 15, 16, 17, 20 21, 22, 28 and 29, Township 13 North, Range 6, East of the Third Principal Meridian, and in the Village of Delton, all in Sauk County, Wisconsin; that the title to said real estate was taken in the name of Lake Delton Hotel Co.; that all of the purchase price therefor was advanced by said William J. Newman, Sr., of Cook County, Illinois, by virtue of which he became entitled to a resulting trust in and to the whole of said real estate, and became entitled to the whole of said real estate, in fee simple, together with all of the rentals, avails and proceeds thereof; that said title so acquired by Lake Delton Hotel Company became and was held in trust for said William J. Newman, Sr., and his heirs, in fee simple; that by virtue of the death of said William J. Newman, Sr., on June 2, 1943, and the subsequent deaths of certain of his heirs, the interest of William J. New-

man, Sr., in said real estate is now vested in the plaintiffs; that the court should find that all conveyances made by said Lake Delton Hotel Company and/or Lake Delton Development Company, or Ralph M. Hines, James H. Hill, Sr., Hilmer C. Amundson, Henry C. Titus, or any other officers, directors or nominees of said corporation, were made by them with full knowledge of the interest therein of said William J. Newman, Sr., and should be held null and void, and removed as clouds upon the title of plaintiffs; and that an accounting should be had between the plaintiffs and the parties defendant; and that plaintiffs should have such other relief as equity requires.

8 Withdrawal of Clifford G. Mathys as resident counsel for plaintiffs; appearance of Frank M. Coyne as resident counsel for plaintiffs; approval of withdrawal and substitution by Judge Stone on September 18, 1954.

9-11 Notice to attorneys for defendants, to Frank M. Coyne and to plaintiffs by E. R. Borgmeier of her motion to withdraw as attorney for plaintiffs, with attached motion dated October 21, 1954, and affidavit of mailing showing mailing on October 21, 1954.

12-14 Order entered by Judge Stone on November 10, 1954, showing hearing on above motion on November 3, 1954, "the plaintiffs appearing by their attorney, Frank M. Coyne and providing inter alia:

13 "Paragraph 4. That the motion of E. R. Borgmeier to withdraw as the attorney for the plaintiffs, it appearing that the plaintiffs have had reasonable notice of the desire of said E. R. Borgmeier to withdraw, and the Court so finds, be and same is hereby granted."

15-16 Notice to plaintiff by E. R. Borgmeier of hearing on above withdrawal motion set for November 4,

1954. Affidavit of mailing to plaintiffs on November 1, 1954. Filed November 22, 1954.

17-18 Notice to plaintiffs by E. R. Borgmeier of entry of order on November 3, 1954, granting inter alia leave to withdraw as attorney for plaintiffs. Affidavit of mailing to plaintiffs on November 9, 1954. Filed November 22, 1954.

19 Withdrawal by E. R. Borgmeier as attorney for plaintiffs, dated November 9, 1956. Filed November 22, 1954.

20 Order of Judge Stone dated December 7, 1954 (filed January 3, 1955) directing E. R. Borgmeier, original attorney for plaintiffs, to appear before the Court in person on January 4, 1955, and show cause why an order should not be entered directing her to turn over all books, records, documents, pleadings, exhibits, etc., now or ever in her possession to Frank M. Coyne, Geoffrey Fleming, or Helen Fleming, or any of the other plaintiffs as the Court shall direct; copy of said order to be served on respondent not less than 48 hours prior to return date.

21-23 Motion of Frank M. Coyne, attorney for plaintiffs, with supporting affidavit of Geoffrey Fleming, seeking entry of above order.

23 (Reverse side). Return of above writ unexecuted by U. S. Marshal at Chicago, Illinois, dated January 4, 1955.

24-28 Special and Limited Appearance of E. R. Borgmeier and supporting affidavit to order entered December 7, 1954, solely to contest jurisdiction of court over resondent. Sets forth her attorney's retaining lien on documents in her possession for costs advanced for plaintiffs in the sum of $10,004.96 (exclusive of attor-

neys' lien for services in connection with case of Fleming *vs.* Lake Delton Dev. Co.)

29 Affidavit of mailing showing mailing of Special and Limited Appearance and supporting documents on December 31, 1954.

30-34 Itemized statement (attached to Special and Limited Appearance) of costs advanced and obligations incurred on behalf of plaintiffs, dated November 10, 1954, showing balance due $10,004.96.

35 Notice of motion by Frank M. Coyne to E. R. Borgmeier dated January 22, 1955, for presentation on January 25, 1955. Filed January 25, 1955.

36 Motion of Frank M. Coyne, dated January 22, 1955, asking court "to vacate that portion of its order of November 3, 1954, which granted motion of E. R. Borgmeier to withdraw as attorney for plaintiffs, and to enter order reinstating her as counsel for plaintiffs, and compelling her to present herself to the court for such further order as is proper and necessary in the further prosecution of this action".

37-38 Order entered by Judge Stone on January 26, 1955, showing hearing on January 25, 1955, and providing inter alia:

38 "(1) That plaintiffs' motion to vacate that portion of the order dated November 3, 1954 granting the motion of E. R. Borgmeier to withdraw as attorney for the plaintiffs and to reinstate her as counsel for said parties and compelling her to present herself to the Court for such further order as is proper and necessary, be and the same is hereby continued until February 14, 1955 at 10:00 A.M., and that such motion come on for hearing at that time before this Court in his courtroom in the City of Madison, Wisconsin, and that said E. R. Borgmeier is hereby directed to be personally present in said

courtroom at that time.

39-45 Special and Limited Appearance of E. R. Borgmeier and supporting affidavit to order entered January 26, 1955, solely to contest jurisdiction of court over respondent. Sets forth her retaining lien on documents in her possession for costs advanced for plaintiffs in sum of $10,004.96 (exclusive of attorneys' lien for services in connection with case of Fleming *vs.* Lake Delton Dev. Co.)

46 Affidavit of mailing showing mailing of Special and Limited Appearance and supporting documents on February 10, 1955.

47-51 Itemized statement (attached to Special and Limited Appearance) of costs advanced and obligations incurred on behalf of plaintiffs, dated November 10, 1954, showing balance due $10,004.96.

52-53 Order entered by Judge Stone on February 15, 1955, showing hearing on February 14, 1955, and providing inter alia:

53 (4) That the order of this court heretofore entered discharging said E. R. Borgmeier as attorney for the plaintiffs be and the same is hereby vacated and set aside; that said E. R. Borgmeier again appear herein as attorneys for the plaintiffs; and that she within ten days from the date of this order deposit with the clerk of this court each and all of the papers which have come into her possession as such attorney for the plaintiffs.

54 Notice of Appeal dated February 25, 1955, by E. R. Borgmeier from order of Judge Stone entered February 15, 1955. Filed February 28, 1955.

55-56 Designation of Contents of Record on appeal of E. R. Borgmeier from order entered by Judge Stone on February 15, 1955.

57 Affidavit of Mailing showing mailing of Designation of Contents of Record on Appeal, together with

Statement in Accordance with Rule 10(b) of the United States Court of Appeals, on March 18, 1955.

58-63 Statement in accordance with Rule 10(b) of the United States Court of Appeals filed by E. R. Borgmeier in connection with appeal from order entered by Judge Stone on February 15, 1955. Filed March 21, 1955.

64-65 Statement of Points on Appeal filed in connection with appeal from order entered by Judge Stone on February 15, 1955. Filed March 21, 1955.

66 Affidavit of Mailing showing mailing of Statement of Points on Appeal, on March 18, 1955.

67-69 Order entered on March 25, 1955, by Judge Stone on court's own motion, directing that paragraph (4) of the order of February 15, 1955, entered by this Court be vacated and set aside; and that Paragraph (4) of the Order entered herein on November 19, 1954, granting leave to E. R. Borgmeier to withdraw as attorney for plaintiffs, be and the same is hereby reinstated, and is now in full force and effect.

70-72 Stipulation entered into in open court on September 21, 1955, by and between the plaintiffs in person and by their counsel, Frank M. Coyne and Geoffrey Fleming and by defendants in person and by their counsel, Mr. Arthur Wickham, James H. Hill, Sr., James H. Hill, Jr., Harold Langer, and Robert Kasiska; with order approving same (caption omitted):

STIPULATION

It is stipulated and agreed that, upon the representations by plaintiffs that all of the parties plaintiff are adults and that payment can properly be made to them without any order or further order of any court having jurisdiction of minors, the defendants agree to pay in to the Clerk

of the United States District Court for the Western District of Wisconsin, for the use and benefit of the plaintiffs, and as a full, final and complete discharge of any and all claims and liabilities, either due or in expectancy, of the plaintiffs or any of them against the defendants or any of them, or against any parties defendant against whom service of process has been attempted or who appear anywhere in the pleadings or the files in this proceeding as defendants, their heirs and assigns, the sum of $32,500.00 in manner and form as follows: $10,000.00 within thirty days of this date; $10,000.00 within sixty days of this date; and $12,500.00 within one year of this date.

It is further stipulated and agreed that this action will only be dismissed upon the full payment of said sum of $32,500.00; that in the event of a default on the part of the defendants, any sums so paid in under this stipulation shall be defaulted to the plaintiffs, and this case shall then proceed as if this stipulation had not been entered into, the testimony presently taken herein to be used and considered upon any such hearing of this cause.

It is further stipulated and agreed that, upon producing satisfactory evidence to the court the final payment of $12,500.00 under this stipulation, the defendant may, without other or further notice, procure an order dismissing this action with prejudice and on the merits, each party to pay their own costs, plaintiff to pay the balance of the Clerk's fees, if any.

It is further stipulated and agreed that James H. Hill, Jr., shall without further delay give written notice by registered mail to Eleanor Borgmeier, Esq., at her last-known place of address, of the proceedings herein as above set forth, so that the said Miss Borgmeier may take such step as she may desire to enforce any lien which she may claim or assert herein.

The foregoing Stipulation is approved.

Permission is hereby granted to the defendants to withdraw 1934 to 1936 Audit of McMurray Smith & Company upon their agreement to return it into court at any time requested.

September 21, 1955.

/s/ Patrick T. Stone
United States District Judge

73-78 Affidavit of James H. Hill, Jr., acknowledged September 23, 1955, showing service of notice on E. R. Borgmeier of above stipulation and order, together with supporting documents, including registry receipt dated September 24, 1955, signed by E. R. Borgmeier; carbon copy of letter from James H. Hill, Jr., to E. R. Borgmeier; notice to E. R. Borgmeier from James H. Hill, Jr., dated September 21, 1955.

79-80 Order entered by Judge Stone on November 9, 1955. (Caption omitted.)

ORDER

Upon reading and filing of annexed petition of Geoffrey Fleming; and on motion of Frank M. Coyne, one of the attorneys for the plaintiffs,

It Is Hereby Ordered that Attorney Eleanore Borgmeier, Esq., original attorney for the plaintiffs in the above entitled matter appear before this court at 9:00 o'clock in the forenoon on the 17th day of November, 1955, in the Court rooms in the Federal Building, Madison, Wisconsin, and then and there show cause, if any, why the alleged attorney's lien purported to have been filed in the above captioned matter should not be adjudicated or otherwise disposed of and upon adjudication of said alleged lien rights, monies now on deposit pursuant to settlement agreement dated September 21, 1955, should not be paid to the plaintiffs.

It Is Further Ordered that a copy of this Order to-

gether with the Petition of Geoffrey Fleming be served upon said Eleanore Borgmeier, Esq., by registered United States mail with return receipt, said registered mail notice to be sent from the office of the Clerk of the United States District Court of the Western District of Wisconsin to said Eleanore Borgmeier at her last known address as on file with this Court to-wit; 500 Illiñois Street, Lemont, Illinois, said registered mail service to be made on said Eleanore Borgmeier at least ninety-six (96) hours prior to the aforementioned return date.

Dated this 9th day of November, 1955.

/s/ Patrick T. Stone
Judge

81-83 Petition of Geoffrey Fleming, acknowledged November 8, 1955, reciting that he is one of the attorneys for and duly authorized agent of the plaintiff and has knowledge of the fact; that prior to the filing of the complaint the plaintiffs entered into an oral agreement with said Eleanor Borgmeier to prosecute their claim for an agreed fee of 50% of any amount recovered by suit or settlement, and in the event no recovery of money damages was had, there would be no charge by her for said services; that there was no agreement by plaintiffs to pay any expenses whatsoever, except those court costs incidental to the prosecution of said suit; that on or about November 3, 1954, without cause, said Eleanor Borgmeier withdrew as attorney of record for plaintiffs; and that she thereafter refused to prosecute said claim and wilfully withheld all books and records of plaintiffs which came into her possession while acting as their attorney; that after she had withdrawn as such attorney plaintiffs necessarily employed Frank Coyne and petitioner to prosecute said action, and they in so doing atempted to cause the reinstatement of said Eleanor Borgmeier by

order of which, but she refused to re-enter the case and register service of orders upon her to do so, or to deliver up documents in her possession, and thereafter plaintiffs expended large sums of money duplicating whatever investigations had been made by said Eleanor Borgmeier; that petition is informed that subsequent thereto said Eleanor Borgmeier filed an alleged attorney's lien with the defendants that no such alleged lien was ever filed upon any of the plaintiffs, Attorney Frank Coyne or petitioner, nor was any ever filed in this court; that the above cause was settled for the sum of $22,500 to be paid in installments, and defendants, for their own benefit and protection, requested the right to deposit all installments with the Court for distribution; that such was permitted by order dated September 21, 1955, in open court, and that Eleanor Borgmeier was advised personally and in writing of such order and deposit, and was notified to assert any claim she alleged to have against such proceeds, all of which appears of record; that Eleanor Borgmeier has served no lien to this day on petitioner or plaintiffs nor has she filed any claim with said Court; that on September 21, 1955, the first payment of $10,000.00 with the Clerk of this court for distribution among plaintiffs, subject to the disposition of the foregoing attorney's lien of said Eleanor Borgmeier.

Wherefore petitioner prays that an order be entered requiring said Eleanor Borgmeier to answer this petition, and that her rights, if any, under said attorney's lien and contract of employment be adjudicated by this Honorable Court at an early date.

84 Ledger sheet showing deposits with Clerk of Court.

1953 May 21	Received check dated 5/21/53, remitted by Helen Newman Fleming	$200.00

1955 Oct. 11	Received from Lake Delton Co., pursuant to court order Sept. 21, 1955	$10,000.00
1955 Nov. 8	Received from Lake Delton Co. pursuant to court order Sept. 21, 1955	$10,000.00

85-89 Garnishee summons and garnishee complaint served on Clerk of District Court on November 15, 1955 by Sheriff of Dane County, Wisconsin, in case entitled "Virginia K. Newman *v.* William J. Newman, Defendant; Lake Delton Development Company, a Wisconsin corporation, and Edgar M. Alstad, Clerk of Federal District Court, Madison, Wisconsin, Garnishee Defendants; issued by Circuit Court of Dane County, Wisconsin, John J. Walsh, plaintiff's attorney; filed November 17, 1955.

90 Affidavit of Mailing by Edgar M. Alstad, Clerk of the United States District Court, acknowledged November 9, 1955 (with receipt No. 4136, Madison November 9, 1955), showing mailing by registered mail of copy of order to show cause entered by Judge Stone on November 9, 1955, addressed to Mrs. Eleanor Borgmeier, attorney at law, 500 Illinois Street, Lemont, Illinois.

ORDER

91-92 Order entered by Judge Stone on November 17, 1955, caption omitted.

The order to show cause against Attorney Eleanor Borgmeier, Esquire, seeking adjudication or disposition of the alleged lien on proceeds in the above matter, dated November 9, 1955, coming on for hearing at 9:00 in the forenoon on the 17th day of November, 1955, in the Federal Court rooms in Madison, the Honorable Patrick T. Stone, District Judge, presiding, and appearances being as follows:

Frank M. Coyne and Geoffrey Fleming on behalf of the plaintiffs, James Hill, Jr. on behalf of defendant, Lake Delton Development Company, Attorney John Walsh appearing on behalf of Virginia Newman, former wife of William Newman, Jr., pursuant to a garnishment served upon the defendant, Lake Delton Development Company and Edgar Alstad, Clerk of the United States District Court, in an action entitled Virginia Newman vs. William Newman, Jr., presently pending in the Circuit Court of Dane County, and there being no further appearances,

It Is Hereby Ordered that due and sufficient service of said Order to Show Cause upon Eleanore Borgmeier, Esquire, has been effected and that there has been no appearance by her nor by anyone on her behalf and that the Court has jurisdiction to pass upon the aforementioned Order to Show Cause and application for distribution of funds by the plaintiffs; and

It Is Further Ordered that the present sum of $20,000 now on deposit with Edgar Alstad, Clerk of the above captioned United States District Court, pursuant to settlement agreement of September 21, 1955, be hereby released to the plaintiffs through their attorneys free from any lien of Attorney Eleanore Borgmeier, Esquire.

It Is Further Ordered that such portion of the $20,000 on deposit which constitutes the net interest of William Newman, Jr. in said proceeds, such amount appearing to be $1666.67 as appears by approval of counsel for plaintiff Virginia Newman, shall be retained by Edgar Alstad, Clerk of United States District Court, pursuant to the aforementioned garnishment in the aforedescribed action subject to disbursements in accordance with order of the Circuit Court of Dane County in said action, and that all other monies of the $20,000 fund now on deposit in the instant action be released from said garnishment.

It Is Further Ordered that the garnishment served on

the Clerk of United States District Court in the Virginia Newman-William Newman, Jr. action still be considered in effect insofar as it should relate to the interest of William Newman, Jr. of any further proceeds to be paid by the defendants to said Clerk as a result of the settlement of the instant law suit, said continuing garnishment relating only to the interest of William Newman, Jr. of any further proceeds.

It Is Further Ordered that Edgar Alstad, Clerk of the United States District Court for the Western District of Wisconsin, shall release and pay to Attorney Frank M. Coyne as attorney for the plaintiffs the sum of $18,333.33 of the $20,000 now on deposit with said Clerk.

Dated this 17th day of November, 1955.

By the Court:
/s/ Patrick T. Stone
Judge.

Approved as to the interest of William Newman, Jr. garnishment.

/s/ John J. Walsh
Attorney for
Virginia Newman.

94-95 Undelivered, unclaimed and unopened envelope, Registered Mail, Special Delivery, sent by Clerk of the United States District Court for the Western District of Wisconsin, addressed to Mrs. Eleanor Borgmeier, Attorney at Law, 509 Illinois Street, Lemont, Illinois, postmarked at Madison, Wisconsin, on November 9, 1955, and on November 22, 1955, and at Lemont, Illinois, on November 10, 1955, and on November 21, 1955. Filed November 22, 1955.

95-96 Notice of Appeal by E. R. Borgmeier dated December 12, 1955, filed December 13, 1955, from order entered November 17, 1955, as follows:

IN THE DISTRICT COURT OF THE UNITED STATES
For the Western District of Wisconsin

Helen N. Fleming, William J. Newman, Jr., Margaret N. Walsh, Richard P. Newman, Josephine N. Krug, Adelaide Loiceano, and William McKavis, a minor, by Helen N. Fleming, his next friend,

Plaintiffs,

vs.

Lake Delton Development Company, a Wisconsin corporation, Ralph M. Hines, James H. Hill, Sr., Hilmer C. Amundson and Henry C. Titus,

Defendants,

and

James H. Hill, Jr., Millie M. Risley, Frances Hines and A. B. Batty,

Impleaded Defendants.

On Appeal of E. R. Borgmeier,

Respondent.

NOTICE OF APPEAL TO THE COURT OF APPEALS.

Notice is hereby given that E. R. Borgmeier, Respondent, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order entered in the above cause on November 17, A.D. 1955, and particularly from that part thereof in words and figures as follows:

"It Is Hereby Ordered That due and sufficient service of the order to show cause upon Eleanore Borgmeier, Esquire, has been effected and that there has been no appearance by her nor by anyone on her behalf and that the Court has jurisdiction to pass upon the aforementioned Order to Show Cause and application for distribution of funds by the plaintiffs, and

"It Is Further Ordered That the present sum of $20,000 now on deposit with Edgar Alstad, Clerk of the above captioned United States District Court, pursuant to settlement agreement of September 21, 1955, be hereby released to the plaintiffs through their attorneys free from any lien of Attorney Eleanore Borgmeier, Esquire.

It Is Further Ordered that such portion of the $20,000 on deposit which constitutes the net interest of William Newman, Jr. in said proceeds, such amount appearing to be $1666.67 as appears by approval of counsel for plaintiff Virginia Newman, shall be retained by Edgar Alstad, Clerk of United States District Court, pursuant to the aforementioned garnishment in the aforedescribed action subject to disbursements in accordance with order of the Circuit Court of Dane County in said action, and that all other monies of the $20,000 fund now on deposit in the instant action be released from said garnishment.

"It Is Further Ordered that the garnishment served on the Clerk of United States District Court in the Virginia Newman-William Newman, Jr. action still be considered in effect insofar as it should relate to the interest of William Newman, Jr. of any further proceeds to be paid by the defendants to said Clerk as a result of the settlement of the instant law suit, said continuing garnishment relating only to the interest of William Newman, Jr. of any further proceeds.

It Is Further Ordered That Edgar Alstad, Clerk of the United States District Court for the Western District of Wisconsin, shall release and pay to Attorney Frank M. Coyne as attorney for the plaintiffs the sum of $18,333.33 of the $20,000 now on deposit with said Clerk.

Dated this 12th day of December, A.D. 1955.

E. R. Borgmeier /s/ E. R. Borgmeier
Office Address: Attorney pro se.
500 Illinois Street,
Lemont, Illinois.

97-98 Notice of attorney's lien by E. R. Borgmeier, filed December 13, 1955.

To: Lake Delton Development Company, a Wisconsin corporation, Ralph M. Hines, James H. Hill, Sr., Hilmer C. Amundson and Henry C. Titus, James H. Hill, Jr., Millie M. Risley, Frances Hines and A. B. Batty, and Hill Miller & Hill.

Please Take Notice That the undersigned attorney, E. R. Borgmeier, of Lemont, Cook County, Illinois, was heretofore employed by the undersigned:

> Helen N. Fleming and Geoffrey Fleming, William J. Newman, Margaret N. Walsh and Edwin Walsh, Richard P. Newman, Josephine N. Krug and George Krug, Adelaide McKavis Loiacano, and William McKavis, and Helen N. Fleming and Geoffrey Fleming, as the duly authorized agents of Helen N. Fleming and Geoffrey Fleming, William J. Newman, Margaret N. Walsh, and Edwin Walsh, Richard P. Newman, Josephine N. Krug and George Krug, Adelaide McKavis Loiacano and William McKavis,

to prosecute the above action against you, and who agreed to pay as compensation for such services rendered one-half (½) of whatever amount might be recovered therefrom by suit, settlement or otherwise, with the agreement that such compensation and disbursements expended in connection therewith would be a first lien on any amount recovered; that thereafter and on or about to-wit, the 21st day of October, A.D. 1954, the undersigned was discharged as their attorney, and thus became entitled to compensation on a *quantum meruit* basis for legal services rendered, together with all disbursements expended in connection with said proceeding; and therefore the undersigned claims a lien upon the above cause of action and

upon any proceeds or damages which may be derived in said action, either by judgment or settlement thereof, as security for her fees and disbursements in the conduct of such litigation up to and including November 3, 1954, in the sum of Ninety-five Thousand ($95,000.00) Dollars on account of fees, and the balance of Three Thousand Two Hundred Fifty-four and 96/100 ($3,254.96) Dollars for the balance of disbursements made.

99 Affidavit of mailing by E. R. Borgmeier, showing mailing of said attorney's lien by registered mail on February 25, 1955, to the following:

Lake Delton Development Company, a Wisconsin corporation, Lake Delton, Wisconsin;
Ralph M. Hines, Lake Delton, Wisconsin;
James H. Hill, Sr., Baraboo, Wisconsin;
Hilmer C. Amundson, Baraboo, Wisconsin;
Henry C. Titus, Reedsburg, Wisconsin;
A. B. Batty, Lake Delton, Wisconsin;
James H. Hill, Jr., Baraboo, Wisconsin;
Erma C. Miller, Baraboo, Wisconsin; and
Arthur Wickham, 828 North Broadway, Milwaukee 2, Wisconsin. (the same being refused by Arthur Wickham);

100 Bill for legal services, dated February 21, 1955, (filed on December 21, 1955) rendered by E. R. Borgmeier to the following: Helen N. Fleming and Geoffrey Fleming, William J. Newman, Margaret N. Walsh and Edwin Walsh, Richard P. Newman, Josephine N. Krug and George Krug, Adelaide McKavis Loiacano, and William McKavis, and Helen N. Fleming and Geoffrey Fleming, as the duly authorized agents of Helen N. Fleming and Geoffrey Fleming, William J. Newman, Margaret N.

Walsh and Edwin Walsh, Richard P. Newman, Josephine N. Krug and George Krug, Adelaide McKavis Loiacano and William McKavis,

To legal services rendered in re Fleming et al., vs. Lake Delton Development Co., et al., to and including November 3, 1954 . . . $95,000.00.

(3800 hours at $25.00 per hour)

101 Affidavit of mailing by E. R. Borgmeier, showing mailing of said bill for legal services on February 22, 1955.

102-104 Statement of Points on Appeal filed by E. R. Borgmeier on December 21, 1955.

105 Affidavit of mailing by E. R. Borgmeier, showing mailing of Statement of Points on Appeal on December 20, 1955.

106-114 Statement of E. R. Borgmeier in Accordance with Rule 10 (b) of the United States Court of Appeals.

115-117 Appeal bond of E. R. Borgmeier in sum of $250.00, dated December 12, 1955, with United States Fidelity and Guaranty Company, a Maryland corporation, as surety, conditioned for payment of costs on appeal. Filed December 13, 1955.

118-119 Notice of motion by E. R. Borgmeier requesting court to include original transcripts of proceedings in record on appeal, dated December 19, 1955, filed December 21, 1955, together with affidavit of mailing.

120-121 Motion of E. R. Borgmeier to include original transcripts of proceedings in record on appeal, dated December 19, 1955.

122-123 Order entered by Judge Stone dated January 2, 1956, directed to be expunged by mandate of the Court of Appeals dated May 11, 1956, in case entitled "E. R. Borgmeier, Petitioner, vs. Patrick T. Stone, etc., Respondent, Case No. 11675.

124-134 Affidavit and motion of Frank M. Coyne dated December 30, 1955, requesting entry of order dated January 2, 1956.

135-150 Affidavit of mailing of Frank M. Coyne dated January 23, 1956, filed January 24, 1956, showing mailing to E. R. Borgmeier of orders of January 2, 1956, January 18, 1956, and supporting affidavit and motion.

151-152 Order entered by Judge Stone dated January 18, 1956, filed January 25, 1956, directed to be expunged by mandate of the Court of Appeals dated May 11, 1956, in case entitled "E. R. Borgmeier, Petitioner, vs. Patrick T. Stone, etc., Respondent, Case No. 11675.

153-154 Copy of order entered by Judge Stone on January 2, 1956.

155-163 Copy of Affidavit of Frank M. Coyne dated December 30, 1955, requesting entry of order dated January 2, 1956.

164-165 Copy of motion of Frank M. Coyne dated December 30, 1955, requesting entry of order dated January 2, 1956.

165 (Reverse side) Return of United States Marshal at Chicago, Illinois, dated January 21, 1956, showing service of copy of complaint on Edmund J. Johnson, husband of E. R. Borgmeier, on January 21, 1956.

166-167 Copy of order entered by Judge Stone on January 18, 1956.

168-169 Copy of order entered by Judge Stone on January 2, 1956.

170-178 Copy of Affidavit of Frank M. Coyne dated December 30, 1955, requesting entry of order dated January 2, 1956.

179-180 Copy of motion of Frank M. Coyne dated December 30, 1955, requesting entry of order dated January 2, 1956.

181 Affidavit of service of Earl Rodrian, of Cook County, Illinois, showing service of document on E. R. Borgmeier, personally, on January 28, 1956, at 8:00 P.M. Acknowledged January 30, 1956, before Geoffrey Fleming, notary public.

182-184 Copy of Mandate of the United States Court of Appeals, dated May 11, 1956, issued in case of E. R. Borgmeier, etc., Petitioner, vs. Patrick T. Stone, etc., Respondent, Case No. 11675, with accompanying letter of Kenneth J. Carrick, Clerk of the United States Court of Appeals, dated June 7, 1956. Filed June 8, 1956.

185-187 Opinion of the United States Court of Appeals, dated May 11, 1956, issued in case of E. R. Borgmeier, etc., Petitioner, vs. Patrick T. Stone, etc., Respondent, Case No. 11675. Filed June 8, 1956.

188-197 Photostatic copy of docket entries in District Court. Marked "Case Closed 11/28/55."

198-200 Designation of Contents of Record on appeal of E. R. Borgmeier, from order entered by Judge Stone on November 17, 1955. Filed December 21, 1955.

201 Affidavit of Mailing by E. R. Borgmeier, showing mailing of Designation of Contents of Record on appeal of E. R. Borgmeier from order entered by Judge Stone on November 17, 1955.

202 Certificate of Clerk of the United States District Court for the Western District of Wisconsin, dated August 1, 1956, attesting to record on appeal.

In a separate folder forwarded by the Clerk of the District Court are three copies (carbon) of transcripts of proceedings had before Judge Stone:

a) proceedings had November 3, 1954;

b) proceedings had January 25, 1955;

c) proceedings had February 14, 1955;

TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE STONE ON JANUARY 25, 1955.

18-19 Mr. Fleming: May I say something?

Mr. Coyne Yes; sure.

The Court: Will you enter your appearance, please?

Mr. Fleming: Fleming, Judge, Geoffrey Fleming.

I think the Court—there isn't any question about it—the Court should pass on this question of res adjudicata and the Statute of Limitations, which will either sustain our position, or be rejected by the Court.

I agree with Mr. Wickham that perhaps that should have been done by Mrs. Borgmejer long before she got into this question of the facts; because if it is sustained, we could proceed then, or if their motion is overruled, we could proceed then to present the facts to establish the confidential relationship.

The Court: That should have been done before all this photography.

Mr. Fleming: That's right; it was done backwards. At one time I suggested that it be done, and at just about that time—I mean, when I discovered how much expense had been incurred, I suggested that these motions be disposed of before anything else be done. That is when the difficulty arose, because the money was then shut off.

But Mr. Wickham filed his motion for summary judgment and brought the case up, or brought the issue up. And, as I have talked to Mr. Coyne, I have felt we should have disposed of that matter before. . . .

* * * * * * *

44 Mr. Wickham: Their point is that they are coming into equity to establish an equitable title, claiming that that order of Judge Holly and what he did was wrong.

Mr. Coyne: No.

Mr. Fleming: No, no.

Mr. Wickham: That there was either a fraud upon him,

and they are asking for relief, and they were parties to it, or he was a party to the fraud himself.

The Court: From what he (Mr. Fleming) says here, there is an intimation there was a little fraud somewhere along the line, on the court.

TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE STONE ON FEBRUARY 14, 1955.

14 The Court: * * Are you ready for trial?

Mr. Coyne: No.

The Court: It is not going to be delayed. This case is going to be brought on to trial very, very promptly.

Mr. Coyne: No—I would like to say this: I am not interested in delaying it. I am interested in getting enough time to prepare it so I can do justice for my clients here.

The Court: Apparently you have got it pretty well prepared now.

Mr. Coyne: I have found all this material in the adverse examinations that Borgmeier took of these people—and I want to say this: When we were here three weeks ago I didn't know any of this—then I was arguing this on general principles and on what I merely understood as to whether this agreement existed—

* * * * * * *

16 Mr. Coyne: I would like to ask this—I can't do it by next week, but I am not going to unduly delay it here, I will try to do it as rapidly as I can.

The Court: This case has been hanging around this Court a year, hasn't it, or more?

Mr. Wickham: It will be two years in May.

Mr. Coyne: It isn't my fault—

The Court: No, Mr. Fleming is responsible for the handling of the case. This case will be set down for trial next Monday.

Mr. Coyne: What can I do about Miss Borgmeier?

The Court: I don't know.

Mr. Coyne: Your Honor, next Monday I am going to be in Kansas City..

The Court: Mr. Fleming is a competent lawyer. He was in this from the very beginning. * * * * *

In a separate folder are several exhibits introduced at the trial before Judge Stone on September 20-21, 1955, none of which are pertinent to the question now presented on this appeal.

The ledger sheet appearing at Page 84 of the Record does not disclose the disbursements made by the Clerk from the moneys on deposit, and the Record should be completed in this respect.

An examination of the Record does not disclose any proof of service of the Notice of Appeal herein (filed by appellant with the Clerk of the District Court on December 13, 1955), which service was required to be made by the Clerk of the District Court upon all parties entitled to receive the same, and the Record should also be corrected to show such service.

Office - Supreme Court, U.S.
FILED
JUN 20 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. ~~1104~~ 205

E. R. BORGMEIER,

Petitioner,

vs.

HELEN N. FLEMING, WILLIAM J. NEWMAN, JR., MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOIACANO, and WILLIAM McKAVIS, a minor, by HELEN N. FLEMING, his next friend,

Respondents.

LAKE DELTON DEVELOPMENT COMPANY, a Wisconsin Corporation, RALPH M. HINES, JAMES H. HILL, SR., HILMER C. AMUNDSON and HENRY C. TITUS,

Respondents,

and

JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES and A. B. BATTY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDMUND J. JOHNSON,
E. R. BORGMEIER,
1889 Ingleside Terrace N.W.
Washington, D. C.,
Attorneys for Petitioner.

E. R. BORGMEIER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1957

No.

E. R. BORGMEIER,

Petitioner,

vs.

HELEN N. FLEMING, WILLIAM J. NEWMAN, JR., MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOIACANO, and WILLIAM McKAVIS, a minor, by HELEN N. FLEMING, his next friend,

Respondents,

LAKE DELTON DEVELOPMENT COMPANY, a Wisconsin Corporation, RALPH M. HINES, JAMES H. HILL, SR., HILMER C. AMUNDSON and HENRY C. TITUS,

Respondents,

and

JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES and A. B. BATTY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, E. R. Borgmeier, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The order entered by the United States District Court for the Western District of Wisconsin, Judge Patrick T. Stone presiding, on November 17, 1955, from which an appeal was taken by petitioner, is not reported, but appears in the record filed with and certified by the

Clerk of the Court of Appeals and transmitted herewith. That order released the sum of $20,000.00 (on deposit with the Clerk of that Court under the provisions of a settlement agreement entered into on September 21, 1955, in the case of Fleming vs. Lake Delton Development Company) "free from any lien of Attorney Eleanore Borgmeier, Esquire" (App. 13-14).

The opinion of the United States Court of Appeals for the Seventh Circuit, granting petitioner a writ of mandamus and prohibition, was filed May 11, 1956. Said opinion determined that petitioner was entitled to appeal, and directed that her appeal from the order entered by the trial court on November 17, 1955, be forwarded for review, and that orders of January 4, 1956, and January 17, 1956, entered against her by the trial court, be expunged from the record, and that the trial court exercise no further jurisdiction over the subject matter of the appeal. This opinion is reported in *Borgmeier v. Stone*, 233 Fed. 2nd. 818, and a copy thereof is set forth in the Appendix hereto.

On the appeal thereupon forwarded, the United States Court of Appeals for the Seventh Circuit reversed the order of the trial court of November 17, 1955, but voluntarily remanded said cause to the Western District of Wisconsin, its opinion being filed February 26, 1957, which is set forth in the Appendix hereto and in the certified copy of the record. Said opinion is reported in 241 Fed. 2nd. 865.

JURISDICTION.

On March 27, 1957, the Court of Appeals ordered that the petition for rehearing be denied. (Said order appears in the Appendix hereto). This petition is filed within 90 days of the denial of the petition for rehearing in the United States Court of Appeals for the Sev-

enth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1); and under Rule 19 (b) of the Rules of the Supreme Court.

QUESTIONS PRESENTED.

I. Did the Court of Appeals err in voluntarily remanding said cause to the District Court to determine the merits of petitioner's claim for attorney's lien?

II. Does this action of the Court of Appeals in voluntarily remanding said cause to the District Court, in view of the repeated acts of the trial judge, and in view of the petitioner's known refusal to submit her attorney's lien to the trial judge for determination, bring this cause within the supervisory provision of Rule 19 (b) of the Rules of the Supreme Court?

III. The point of law raised by the opinion of the Court of Appeals, "What action by a party constitutes a submission to the jurisdiction of the court?", should necessarily be settled by this court, as provided by Rule 19 (b).

STATEMENT OF THE CASE.

On May 21, 1953, petitioner as attorney filed a complaint in the United States District Court for the Western District of Wisconsin on behalf of the heirs of William J. Newman, Sr., of Chicago, Illinois, who died June 2, 1943, to establish a constructive trust in lands, personal property and business enterprises located in Sauk County, Wisconsin, conveyed by said William J. Newman and Margaret Y. Newman, his wife, as well as by other nominees of said W. J. Newman, to the Lake

Delton Development Company (then known as Lake Delton Hotel Company). These conveyances were made on or about August 4, 1936, in accordance with an order entered in the United States District Court for the Northern District of Illinois, Eastern Division, in a proceeding then pending therein under Section 74 of the Bankruptcy Act, entitled "*In the Matter of William J. Newman, Debtor*", Case No. 58252. After the entry of the order directing these conveyances, the reorganization proceeding was converted into a straight bankruptcy.

The lands conveyed at that time (exclusive of the personal property and the many and varied business enterprises, and exclusive of the lands and other assets previously conveyed to the nominees) comprised approximately 2300 acres in the Dells area of Wisconsin, and included the lake known as Lake Delton, and were appraised at the close of the calendar year 1936 at the sum of $764,171.00, as is disclosed by the audit of McMurray Smith & Company for the years 1934-1936, withdrawn in accordance with Judge Stone's order of September 21, 1955 (App. 89-10). Since that time considerable expansion, improvement and development has been had, and the properties and businesses so conveyed have been enhanced greatly, and undoubtedly doubled, in value.

The plaintiffs agreed to pay petitioner as compensation for her services in connection with said suit one-half of any recovery by way of suit, settlement or otherwise, which is the basis of her attorney's charging lien.

The defendants include Mr. Newman's Wisconsin representatives and confidential employees, including the Lake Delton Development Company, his solely-owned corporation; Ralph M. Hines, his Wisconsin manager and president of the Lake Delton Development Company;

James H. Hill, Sr., James H. Hill, Jr., and Erma C. Miller, practicing law at Baraboo, Wisconsin, as Hill, Miller & Hill, his Wisconsin attorneys; Hilmer C. Amundson, his Wisconsin engineer; Henry C. Titus, his bookkeeper until 1936; and others. All of the above named defendants, with the exception of Henry C. Titus, remained in such capacity with Mr. Newman until his death, in 1943. All of the defendants in said cause were represented by Arthur Wickham and Erma C. Miller as their attorneys.

The plaintiffs and their spouses included among their number three attorneys, two of whom, Geoffrey Fleming and Edwin Walsh, are actively practicing law at Chicago, Illinois. Said Geoffrey Fleming, the husband of Helen N. Fleming, represented Mr. Newman as his attorney in the reorganization and bankruptcy proceedings at Chicago, Illinois, above referred to, and subsequent to petitioner's withdrawal as plaintiffs' attorney herein, acted as one of the attorneys for plaintiffs.

During the time that petitioner represented plaintiffs as their attorney, she was compelled to devote her entire time and attention to said suit. As a necessary part of such legal services, she removed her domicile to Sauk County, Wisconsin, during the summer of 1953, where among other duties she made complete examinations and duplications of the books and records at the Recorder's office of Sauk County, Wisconsin, from 1926 to date. She was likewise compelled to attend numerous pretrial examinations of the defendants at Madison and Baraboo, Wisconsin, during the winter of 1953-1954. Thereafter by order duly entered by Judge Stone, the defendants deposited with the Clerk of the District Court at Madison ten (10) transfer cases of documents from the offices of the Lake Delton Development Company

and related companies, and from the law offices of Hill, Miller & Hill, and from the offices of his engineer. There were more than 50,000 of such documents, covering the years 1926-1943, and respondent was obliged to remove her residence and office to Madison, Wisconsin, in order to examine these documents. She examined each of them, and caused them to be numbered for identification, and photostated in excess of 10,000, to be used as evidence in the case. These documents were the basis of her attorney's retaining lien, which was not adjudicated by Judge Stone at any time, but which was called to his attention in petitioner's Special and Limited Appearances filed in the trial court on January 3, 1955 (App. 5; 7) and by copies of the itemized account supporting such retaining lien attached to said Special and Limited Appearances (App. 6; 7). The examination, photostating and assembling of these documents required three months of round-the-clock work, and she was also required to employ help in order to accomplish so much in so short a time.

On September 18, 1954, with the approval of Judge Stone by Order entered that day (App. 4) the appearance of Frank M. Coyne was filed in said proceedings as substituted counsel for Clifford G. Mathys, he then entering the case as resident counsel for petitioner on behalf of plaintiffs.

On October 21, 1954, (after petitioner had been discharged by plaintiffs as their attorney), she served her notice of motion and written motion on all necessary persons to withdraw as attorney for plaintiffs, including the plaintiffs and Frank M. Coyne, and the attorneys for defendants (App. 4). The court originally set said motion for hearing on November 4, 1954, (of which date the plaintiffs were notified by respondent—App. 4); but

was thereafter changed to November 3, 1954, without the knowledge of petitioner. At the hearing held on petitioner's motion (with other motions) on November 3, 1954, the court entered an order permitting petitioner to withdraw her appearance as attorney for plaintiffs.

Notice of the entry of said order was forwarded to plaintiffs by petitioner on November 9, 1954 (App. 5). Thereafter, on November 22, 1954, petitioner filed her withdrawal of appearance as attorney for plaintiffs in accordance with said order entered by Judge Stone on November 10, 1954 (App. 5). The filing of such withdrawal, pursuant to court order, terminated the jurisdiction of the District Court over petitioner, and no jurisdiction was ever thereafter acquired over her by said court.

Shortly thereafter, and prior to December 1, 1954, said Frank M. Coyne, who had been acting as resident counsel only, entered into an independent agreement with plaintiffs, and thereafter with Geoffrey Fleming represented plaintiffs actively as their attorney.

On December 7, 1954, Judge Stone entered an *ex parte* order to show cause against petitioner on affidavit of Geoffrey Fleming, why she should not be compelled to deliver up to plaintiffs or their agents all documents in her possession. Such rule to show cause was never served on her, but she did file her Special and Limited Appearance thereto solely to contest the jurisdiction of the Court (App. 5), and to apprize the Court of her attorney's retaining lien on such documents in the sum of $10,004.96 (App. 5, 6) (which lien did not include any amounts due for services rendered in connection with the *Lake Delton* case). Thereafter, on January 25, 1955, on motion of plaintiffs, Judge Stone entered an *ex parte* order vacating that portion of his order of

November 10, 1954, permitting petitioner to withdraw her appearance, and reinstating her as attorney for plaintiffs, and compelling her to present herself to the Court for such further order as is necessary on February 14, 1955 (App. 6); to which order of January 25, 1955 (dated January 26, 1955) petitioner again filed her Special and Limited Appearance seeking solely to contest the jurisdiction of the trial court over her (App. 7); and subsequent to which date Judge Stone entered his order of February 15, 1955 (App. 7) reinstating her as attorney for plaintiffs and directing her to deposit with the Clerk of the Court all documents in her possession.

Thereafter petitioner filed her Notice of Appeal to the United States Court of Appeals from the order entered by Judge Stone on February 15, 1955 (Notice of Appeal, App. 7); and also filed her appeal bond, Designation of Contents, Statement of Points, and Statement in Accordance with Rule 10 (b); all of which were included in the Record on Appeal herein.

On March 25, 1955, Judge Stone, on the court's own motion, entered an *ex parte* order vacating the order from which petitioner had appealed, and reinstated his order of November 3, 1954 (entered November 10, 1954), permitting petitioner to withdraw as plaintiffs' attorney.

Immediately subsequent to the entry of the order of February 15, 1955, from which petitioner prayed an appeal, but prior to the filing of her said Notice of Appeal, petitioner forwarded to plaintiffs on February 21, 1955, her bill for legal services rendered in connection with said *Lake Delton* case, showing 3800 hours of legal services rendered at $25.00 per hour, or a total of $95,000.00 (which said bill, with affidavit of mailing, was filed with the Clerk of the trial court on December 21, 1955 (App. 19), for the sole purpose of including the same in the record on ap-

peal to the Court of Appeals); that she did also, on February 25, 1955, forward to all of the defendants by registered mail, return receipt requested, her Notice of Attorney's Lien for services rendered and balance of costs advanced in connection with said *Lake Delton* case which Notice of Attorney's Lien was filed by her (together with her Notice of Appeal) with the Clerk of the trial Court on December 13, 1955 (App. 18) for the sole purpose of including the same in the record on appeal to the Court of Appeals; that such lien was served upon defendants pursuant to and in accordance with the provisions of Section 256.36 of the laws of the State of Wisconsin with reference to attorney's lien.

Said cause of *Fleming* v. *Lake Delton Development Co.* was called for trial before Judge Stone on September 20, 1955, and on the day following, was settled between the parties, at which time they entered into a settlement agreement and stipulation dated September 21, 1955, which was approved by Judge Stone (App. 8-9-10) that such stipulation provided that defendants would pay plaintiffs in full of all liability the sum of $32,500.00, in installments of $10,000.00 within 30 days, another $10,000.00 within 60 days, and the balance of $12,500.00 within one year from date of such settlement, all such payments to be deposited with the Clerk of the District Court, and that notice of such settlement be given respondent by James H. Hill, Jr., one of the defendants "so that the said Miss Borgmeier may take such steps as she may desire to enforce any lien which she may claim or assert herein"; that Mr. Hill duly gave such notice to petitioner.

The first payment of $10,000.00 was deposited by the defendants with the Clerk of the Court on October 11, 1955; and the second deposit of $10,000.00 was made November 8, 1955 (App. 12-13).

On November 9, 1955, an *ex parte* order was entered by Judge Stone, on motion of Frank M. Coyne with supporting affidavit of Geoffrey Fleming, acknowledged at Chicago, Illinois, on November 8, 1955, directing this petitioner to appear before the court on November 17, 1955, "and show cause, if any, why the alleged attorney's lien purported to have been filed in the above captioned matter should not be adjudicated or otherwise disposed of and upon adjudication of said alleged lien rights, monies now on deposit pursuant to settlement agreement dated September 21, 1955, should not be paid to the plaintiff; and that "a copy of this order together with the Petition of Geoffrey Fleming be served upon said Eleanore Borgmeier, Esq., by registered United States Mail with return receipt, said registered mail notice to be sent from the office of the Clerk of the United States District Court * * * said registered mail service to be made on said Eleanore Borgmeier at least ninety-six (96) hours prior to the aforementioned return date" (App 10, 11). Such notice was accordingly mailed by the Clerk of the United States District Court, but was not received by petitioner.

On November 17, 1955, (on the return of said rule to show cause entered against petitioner on November 9, 1955), Judge Stone entered an order determining that "due and sufficient service of said Order to Show Cause upon Eleanore Borgmeier, Esquire, has been effected and that there has been no appearance by her nor by anyone on her behalf and that the Court has jurisdiction to pass upon the aforementioned Order to Show Cause and application for distribution of funds by the plaintiffs", and ordering "that the present sum of $20,000.00 now on deposit with Edgar Alstad, Clerk of the above captioned District Court, pursuant to settlement agreement of September 21, 1955, be hereby released to the plaintiffs through their attorneys free from any lien of Attorney Eleanore Borgmeier, Esquire." (App. 13-14)

Said sum of $20,000.00 was thereupon immediately withdrawn by plaintiffs and their nominees from the possession of the Court.

On December 13, 1955, petitioner filed her Notice of Appeal to the Court of Appeals from said order of November 17, 1955 (App. 16), together with her appeal bond (App. 20); and thereafter, on December 21, 1955, filed her Designation of Contents (App. 22), her Statement of Points on Appeal (App. 20), and Statement in Accordance with Rule 10 (b) (App. 20). She likewise filed a motion on December 21, 1955 (without submitting herself to the jurisdiction of the trial court), to include the original transcripts of proceedings (App. 20).

She did also on December 13, 1955, file with the Clerk of the Court a copy of her Notice of Attorney's Lien served on defendants on February 25, 1955, in accordance with the Wisconsin statute relating to attorney's liens, Section 256.36; and on December 21, 1955, she did file with the Clerk of the Court a copy of her bill for moneys expended and legal services rendered which she had forwarded to defendants on February 21, 1955; both of which documents were filed with the Clerk for the sole purpose of including the same with the record on such appeal.

Thereafter, on motion and affidavits of Frank M. Coyne, Judge Stone did enter *ex parte* orders to show cause against petitioner on January 2, 1956 (App. 20), and on January 18, 1956 (App. 21), both of which orders were directed to be expunged by the mandate of the Court of Appeals in *Borgmeier* v. *Stone*, 233 Fed. 2nd 818. In accordance with this mandate, petitioner's appeal from the order entered by the trial court on November 17, 1955, was forwarded for review.

During the pendency of such appeal, the final payment of $12,500.00 required by the settlement agreement of

September 21, 1955, was deposited by the defendants with the Clerk of the District Court at Madison, and is now on deposit with said Court.

After the presentation of petitioner's appeal to the Court of Appeals from the trial court order of November 17, 1955, such order of November 17, 1955, was reversed in its entirety by the Court of Appeals in its opinion filed February 26, 1957.

Despite the fact that the sole question presented on that appeal was "Did the trial court have jurisdiction over appellant on November 17, 1955, at the time it entered the order appealed from?" (Brief and Appendix for Appellant, Page 10), yet the Court of Appeals voluntarily and on its own initiative remanded the cause to Judge Stone with directions "to proceed to determine the merits of appellant's claim for lien".

Petitioner assigned her said claim for moneys advanced and fees for legal services rendered, together with her claim for attorney's lien securing a part thereof, to Edmund J. Johnson, her husband, by written assignment dated dated March 26, 1955. Her assignee has elected to, and did file suit on March 26, 1957, on the *assumpsit* claim for moneys advanced and fees for legal services rendered, in the District Court of the United States for the Northern District of Illinois, Eastern Division, Case No. 57-C 551, entitled "*Edmund J. Johnson, Plaintiff* v. *Helen N. Fleming, et al., Defendants*". Said assignee joins in this Petition for the purpose of evidencing his ownership of said claim for moneys due and claim for attorney's lien, and for the further purpose of signifying his assent to this petition.

Petitioner herein prays that this Court review the action of the Court of Appeals in remanding said cause to Judge Stone for further determination.

ARGUMENT.

I.

Petitioner respectfully wishes to point out to this Court that the Court of Appeals erred in several instances in its opinion remanding the cause to the trial court to determine the attorney's lien of petitioner upon its merits.

Said opinion erred at Page 2 thereof, when it stated that the decision entered by the Court of Appeals in the antecedent mandamus and prohibition proceeding (*Borgmeier* v. *Stone*, 233 Fed. 2nd 818) "held merely that, after this appeal has been taken, the district court was without jurisdiction to enter further orders in the cause." That decision not only found that the orders to show cause entered by Judge Stone against petitioner on January 4, 1956, and January 17, 1956, again attempting to dismiss her attorney's lien (after petitioner had taken and perfected her appeal from his order of November 17, 1955) were void and should be expunged from the record, but also found that petitioner was a proper party to appeal, and directed that said appeal be forwarded for review, which Judge Stone had previously declined and refused to do. That decision likewise entered an order of prohibition against Judge Stone, directing him to cease from further action until the further order of the Court of Appeals.

In its opinion herein the Court of Appeals determined that the order entered on November 17, 1955, by the trial court was void and should be reversed, but then without any basis and of its own initiative arbitrarily made the *obiter* finding (upon which the direction to remand was based):

> "However, it appears that subsequent to the entry of the order of which complaint is made, on Decem-

> ber 21, 1955, plaintiff filed with the clerk of the district court her claim for lien upon the fund. * * * Inasmuch as appellant has now sought the aid of the court, and as the court has acquired jurisdiction both of the subject matter and of her person, it now has full authority to entertain and adjudicate her claim."

These findings of the court are in conflict with,

a) the previous parts of its opinion, where it says at Page 2, "She had taken no action in court to prosecute or perfect her claim for lien upon the fund", and where it further says at Page 3, "In view of the further fact that appellant had never filed any petition for relief in court, her alleged interest in the fund was in nowise before the court;" and

b) the facts set forth in the record. Petitioner (as admitted by the opinion) has not to this day taken any action in court, nor as she "filed any petition for relief in court" to prosecute or perfect her claim of lien. Such fact was also well recognized by the court of appeals in its opinion in the mandamus proceeding (and was also recognized by Judge Stone when he entered his orders of January 4, 1956, and January 17, 1956, and when he filed his "return" in said mandamus proceedings), when it said:

> "Respondent (Judge Stone) in his return herein admits that petitioner filed the notice of appeal and the other documents as steps in perfecting her appeal. He further admits that 'he declined to certify the record and instead issued an order' that she "consent to the jurisdiction' of the district court. Respondent had no right to impose any such condition in this connection."

Petitioner has never filed with the trial court a claim for lien, nor has she or her assignee taken any action in

court to enforce her lien. The document which the Court of Appeals herein referred to as petitioner's "claim for lien upon the fund" was in fact merely a copy of her notice of lien addressed to and served upon defendants on February 25, 1955, *dehors* the trial court proceedings, in accordance with Wisconsin statute, and which notice addressed to defendants was filed with the Clerk of the District Court on December 13, 1955, (together with petitioner's notice of appeal) as a necessary concommitant in perfecting her appeal (after the case in chief had been disposed of) for the sole purpose of including said document with the record on her appeal.

In order to become a party to the proceedings and enforce such lien, the attorney must actively seek the aid of the trial court by way of motion or intervention in the cause, and be granted leave to do so by the trial court, which action has not been taken by this petitioner. This is the usual course of procedure, and the one sanctioned by the United States Supreme Court (*Georgia R.R. & Banking Co. of Georgia* v. *Peltus*, 1884, 113 U.S. 116, 120; *Patrick* v. *Leach*, 1881, 17 Fed. 476.)

The Wisconsin attorney's lien statute does not afford the client a method of submitting the lien of his attorney for determination. Such attorney's lien statute must be strictly construed, and all action taken must be in conformity with its requirements. (*Smelker* v. *Chicago and Northwestern Ry. Co.*, Sup. Ct. Wis. 1900; 106 Wis. 135; 81 N.W. 994.

The rule of law is thus stated in 6 C.J., Attorney & Client, Sec. 419, Page 801; "In the absence of statute, otherwise providing, an attorney's lien can be enforced only by the attorney or his assignee".

In *Avery* v. *Avery*, 1893, 5 Misc. Rep. 75 24 N.Y. Sup. 737, the client attempted to enforce the attorney's lien

against the judgment debtor. There the court said, "The rights and interests of the client are in keeping of his attorney, and it is a sacred trust; but to hold conversely that the rights and interests of the attorney are in the keeping of his client would be a unique proposition indeed. The attorney personally is the necessary actor in the proceeding to enforce his own lien."

By its voluntary and gratuitous action in remanding the cause to the District Court, the Court of Appeals has chosen to ignore the approved course of procedure as enunciated in *Crawford* v. *Foster*, 1898, C.C.A. 7th, 84 Fed. 939, "The cause was brought to this court by Writ of Error, and we adhere to the view that the Court below having made no special findings of the facts, no question touching the merits which did not arise upon a ruling of the Court during the progress of the trial (that is to say, upon the hearing of the petition, can be considered."

Petitioner further submits that said notice filed by her after judgment to be included as a part of her appeal record, was not a part of the trial court record, under the doctrine of this court. *Sargeant* v. *St. Bak. Ind.*, 1851, 53 U.S. 371, Fed. Cas. 12360, 13 L. Ed. 1028; *England* v. *Gebhardt*, 1884, 112 U.S. 505, 5 S.Ct. 288, 28 L. Ed. 812; *Fisher* v. *Cockerell*, 1831, 5 Peters 248, 254; 8 L. Ed. 114.

In thus remanding the cause to the trial court, the Court of Appeals has also chosen to ignore its own statements appearing at Pages 2 and 3 of its opinion herein (*supra*); and has chosen to ignore the practice sanctioned by this court; and has also chosen to ignore the statutory requirements and practice of the State of Wisconsin.

In the instant case, since petitioner or her assignee has failed to submit her lien to the trial court for determination, that court is ~~without jurisdiction~~ to try the same;

and inasmuch as the Wisconsin statute does not permit the client to present the lien of his attorney to the trial court for determination, the client herein is limited to his action *in rem* under Chapter 23, U.S.C. Sec. 1655 Lien Enforcement, and the procedure specified by such statute.

II.

The sole question presented to the Court of Appeals herein was "Did the trial court have jurisdiction over appellant (this petitioner) on November 17, 1956, at the time it entered the order appealed from?" The Court of Appeals found that the trial court did not have such jurisdiction, but then capriciously and without basis remanded the cause to the trial court to determine the merits of petitioner's attorney's lien, which had not been submitted to the trial court by petitioner or her assignee, and which the trial court had already repeatedly disregarded.

Petitioner respectfully represents to the court that this action of the Court of Appeals, in view of the repeated actions of the trial judge, and in view of the Wisconsin statute, Secs. 256.36 and 256.37, and in view of the record in the cause, brings this application squarely within the supervisory provision of Rule 19 (b) of the Rules of this Court.

After petitioner had been discharged by plaintiffs as their attorney, and Judge Stone had permitted petitioner to withdraw of record, and her withdrawal had been filed, Judge Stone continually chose to ignore her attorney's lien and any rights petitioner might have, and repeatedly entered *ex parte* orders to show cause against her (no other kind ever being entered by him against her), and all without justification. Should she then be compelled to submit to the jurisdiction of the trial court without cause and against her wishes and consent, thus being deprived of her right of free choice?

Petitioner's withdrawal was filed on November 22, 1954. The first order entered against her by Judge Stone was on December 6, 1954, requiring her to show cause why she should not deliver up to plaintiffs or their agents all documents in her possession (which she had assembled by dint of laborious effort and large expenditures of money), to which order petitioner filed her special and limited appearance apprizing Judge Stone of her attorney's retaining lien in the sum of $10,004.96 (exclusive of services rendered in the *Lake Delton* case). (App. 5, 6).

Judge Stone chose to ignore Petitioner's lien, and instead, on January 25, 1955 (the return date as continued of his order of December 6, 1954) entered an order vacating that portion of his order permitting her to withdraw, and reinstated her as attorney for plaintiffs and compelling her to present herself to the Court on February 14, 1955, and although petitioner again filed her Special and Limited Appearance, setting forth her attorney's retaining lien, he did on the return day of such order to show cause (order dated February 15, 1955) again ignore her lien and reinstate her as attorney for plaintiffs and direct her to deposit with the Clerk of the Court all documents in her possession.

Petitioner filed her notice of appeal from Judge Stone's order of February 15, 1955, together with all necessary documents, and Judge Stone did thereupon on March 25, 1955, "on the Court's own motion", vacate his order of February 15, 1955, and reinstate his order permitting petitioner to withdraw as attorney.

Thereafter when the case came on for trial, a settlement agreement was entered into between the parties whereby the defendants agreed to pay the plaintiffs the ostensible and wholly inadequate sum of $32,500.00 in installments, to which agreement Judge Stone gave his consent, and

permitted defendants to withdraw the exhibit which disclosed the appraisal of the properties in 1936 at $764,171.00; and ordered the settlement installments to be paid into court, directing one of the defendants to notify petitioner of the settlement, which was done.

The second installment of $10,000.00 was deposited with the court on November 8, 1955, prior to its due date. By affidavit dated that same day at Chicago, the court entered an *ex parte* order against petitioner on the day following, November 9, 1955, requiring her to appear and show cause on November 17, 1955 "why moneys now on deposit should not be paid to plaintiffs", notice thereof being sent to her by registered mail, but not delivered. On the return day the court released the entire deposit from her lien, and on the same day $18,333.33 thereof was paid to the attorney for plaintiffs, the balance being paid out a short time later. This order of November 17, 1955, releasing the sum of $20,000.00, is the order appealed from which has now been reversed as void by the Court of Appeals.

After petitioner filed her notice of appeal from said order of November 17, 1955, Judge Stone refused to forward the appeal for review until compelled to do so by the order of mandamus obtained by petitioner; and although all of the moneys in the possession of the court had been disbursed under his order of November 17, 1955, yet Judge Stone did again and again, by *ex parte* orders to show cause dated January 2, 1956, and January 18, 1956, direct petitioner to submit to his jurisdiction for the purpose of determining her lien,—her lien on funds no longer in his possession and already disbursed by his order. These were the orders expunged by the mandamus proceeding.

Petitioner submits that these actions of Judge Stone indicate an unwillingness on his part to recognize her

lien, and that therefore it may well be presumed that he will not adopt an impartial attitude toward the merits of her lien.

Petitioner's charging lien herein is in the sum of $98,254.96. Notice thereof was given to the defendants *dehors* the trial court proceedings according to Wisconsin statute in February, 1955. The agreed settlement was ostensibly $32,500.00, of which $20,000.00 was paid into court by November 8, 1955, and $18,333.33 paid out on November 17, 1955 (the balance being paid out a few days later).

Since there were no funds on deposit with the trial court on December 13, 1955 (at the most the remainder of $12,500.00 was to be paid about one year later), when petitioner filed her notice of appeal herein together with copy of her Notice of attorney's lien in the sum of $98,004.06 as served on the defendants, for the sole purpose of including the same in the record on her appeal, can it be reasonably doubted that the Court of Appeals erred in its opinion herein when it remanded said cause, saying at Page 3, "Inasmuch as appellant has now sought the aid of the court"?

Petitioner submits that the record amply discloses that she has at no time submitted her claim for attorney's lien to the trial court for determination, nor have her actions indicated any intention to do so; on the contrary, her actions have consistently evidenced a refusal to submit said claim to Judge Stone for determination. Upon what has she ever been able to, or can she, impress a lien amounting to $98,004.96?

Petitioner's claim for debt against the plaintiffs in the sum of $105,004.96, as well as her attorney's charging lien herein in the sum of $98,004.96, was assigned by her on

March 26, 1955, to Edmund J. Johnson, and she has at no time since that date had any legal right to sue upon the obligation nor to submit any claim for lien to the trial Court herein nor to any other tribunal.

Petitioner submit that the arbitrary and improper action of the Court of Appeals in remanding the merits of petitioner's lien to Judge Stone, in view of his repeated conduct in suppressing said lien, and in view of petitioner's continuous insistence on her jurisdictional claims, and her refusal to waive the same, brings this cause within the supervisory provisions of Rule 19 (b).

III.

The point of law presented herein is submitted to this Court under the provisions of Rule 19 (b), Rules of Supreme Court. That point of law, "When does a party become subject to the jurisdiction of the court" has been raised solely by the opinion of the Court of Appeals herein, when it remanded the cause to the trial court. It raises an important question of practice, about which the decisions are not uniform, and which should be settled by this court.

The present status of the decisions was stated by Justice Holmes in *Merchants Heat & Light Co.* v. *J. B. Clow & Sons*, 1907, 204 U.S. 286; 27 S. Ct. 285; 51 L. Ed. 488, at 490:

> "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits."

In that case the defendant answered to the merits and filed a recoupment, hence became an actor. This case was cited and followed in *U. S.* v. *Collins, et al.*, C.C.A. 2nd, 1932,

55 Fed. 2nd, 70, where it was said, "The true test is what is done by way of participation in the action."

The general rule of law is set forth in Corpus Juris Secundum (6 C.J.S., Appearances, Sec. 1, Page 4, note 1) as follows:

> "Appearance means the coming into court as a party in a proceeding and asking relief in the progress of the cause. *Everett Ry. Light & Power Co.* v. *U.S.*, D.C. Wash.; 236 Fed. 806, 808."

And at Page 5:

> "An appearance is general where it is an absolute submission to the jurisdiction of the court (*Bacon* v. *Fed. Res. Bk.*, D.C. Wash.; 289 Fed. 513) or defendant takes any substantive step in the proceedings, or as noticed in Sec. 13 *infra* does some act which recognizes the case as in court which is made or done for any purpose other than to question the jurisdiction thereof and which bears some substantial relation to the cause. Such appearance must be express, as noted in Sections 11 and 12 *infra*, or must arise by implication from defendant seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to plaintiff other than one contesting the jurisdiction only."

And at Page 7:

> "It is what the appearing party does rather than what he says that counts (*U.S.* v. *Collins*, C.C.A.N.Y., 55 Fed. 2nd 70), or as is frequently declared, the Court in determining whether a given appearance is general or special will always look to the substance and the state of the record rather than the form of the appearance."

And at Page 9,

> "At any rate if the declared purpose is to make a special appearance and the appearing party's acts and pleadings tend to show that his sole purpose was

to question the Court's jurisdiction, the Court will not enlarge the appearance and make it general by reason of slight inconsistencies, but will give regard to the party's apparent intent (*Dahlgren* v. *Pierce*, C.C.A. Ohio, 263 Fed. 841) for the extent to which defendant submits himself to the jurisdiction when he thus voluntarily comes in is determined by his own consent."

The applicable rule of law is also stated in 3 American Jurisprudence, Page 787, Section 10:

"A general appearance may arise by implication from the defendant's seeking, taking, or agreeing to some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than one contesting the jurisdiction only. The purpose of the appearance, however, must bear some substantial relation to the cause. In other words, it must be a purpose within the cause, not merely collateral thereto. It has been said that the test of a general appearance conferring jurisdiction over the person is whether or not the defendant becomes and actor in the cause. But there is a difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction. In determining the character of an appearance, the Court will always look to matters of substance rather than to matters of form. * * * In some cases it is said that the question whether there has been a general appearance so as to confer jurisdiction over the person of a defendant is one of intent as evidenced by conduct. The instances of the assumption of the role of actor in a suit are such as the taking of a continuance, filing a demurrer to plaintiff's pleading without limiting it to the question of jurisdiction, pleading to issue or to the merits in the first instance, filing set-offs, counter-claims, or notices of recoupment; filing exceptions in a cause, or filing a plea of intervention."

Presenting motions to the court and obtaining orders thereon also constitute action within the cause. All of the text authorities agree on this statement of the law.

Corpus Juris, Volume 4, Appearances, Page 1317, Section 4, sets forth the fundamental consideration in determining the nature of an appearance when it says, "Whether an appearance is general or special is to be determined from the relief asked, and in reaching its conclusion, the Court will always look to matters of substance, rather than form".

The principle of intent, the true test, is laid down in *Citizens Savings & Trust Co. v. Illinois Central R.R.*, 1906, 205 U.S. 46, 27 S. Ct. 425, 51 L. Ed. 703 at 708. This was a bill to remove a lien on property in Illinois, within the jurisdiction of the court, although the defendants were domiciled in other Federal districts within the state. The defendants appeared specially and protested the jurisdiction. The opinion of Mr. Justice Harlan states, "The plaintiff contends that this condition was waived, and the general appearance of the defendants entered, when their counsel, at the hearing as to the sufficiency of the pleas to the jurisdiction, argued the merits of the case as disclosed by the bill. This is too harsh an interpretation of what occurred in the Court below. There was no motion for the dismissal of the bill for want of equity. The discussion of the merits was permitted or invited by the Court in order that it might be informed on that question in the event it concluded to consider the merits along with the question of the sufficiency of the plea to the jurisdiction. We are satisfied that the defendants did not intend to waive the benefit of their qualified appearance at the time of filing the plea to the jurisdiction." This opinion was cited and followed in *Dahlgren v. Pierce*, 1920, C.C.A.

6th, 263 Fed. 841, wherein argument on the merits was indulged in by the attorney who had appeared specially, and it was contended that such action waived the special appearance, the Court saying, "The conduct which will make the motion unavailing and destroy its basis must be clear and unequivocal. * * * and unless there is a rule of law imperatively declaring such a waiver, it ought not to be found from the circumstances of the case. We find no persuasive holding that such a waiver must be inferred, and we refer to some of the cases cited by appellee in support of such an inference, merely to show how far they are from having such supposed effect."

Durabilt Steel Locker Co. v. *Berger Mfg. Co.*, 1927, 21 Fed. 2nd. 139, citing *Dahlgren* v. *Pierce*, *supra*, is to the same effect, the court saying, "Waiver by intention is always a matter of intention and is not to be inferred, except as the result of acts from which an intent may be properly inferred".

In *Grable* v. *Killits*, 1922, C.C.A. 6th, 282 Fed. 185 (cert. denied, 260 U.S. 735, 32 S. Ct. 95, 67 L. Ed. 488), defendants not only appeared specially, but thereafter presented several motions to the court, to dismiss the proceeding, to dismiss the bill, and they resisted restraining orders. The court said, "Here defendants disclaimed in the most solemn manner all intention of entering an appearance except for filing and presenting that motion; they protested that the Court had no jurisdiction over them "in their individual or representative capacities". Nothing could be clearer than an intent not to appear generally. If our conclusion as to the effect of the first motion is correct, clearly the subsequent motion to dismiss the answer upon the merits did not amount to a general appearance. After defendants had done all they

could to avoid personal jurisdiction, they were at liberty to present meritorious defenses and without losing the benefit of the formal motion, so long as they persisted in their protests against personal jurisdiction."

Harkness v. *Hyde*, 1878, 98 U. S. 476; frequently cited, states as follows, "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being waged it is overruled; and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

This principle of law has also been adopted and recognized by the Supreme Court of Wisconsin, and is enunciated in the case of *State ex rel. Cronkhite* v. *Belden*, 1927, 193 Wis. 145, 211 N.W. 916 at 921; 47 A.L.R. 1218, as follows, "The appearance must be in the action, and it must be by entry of record, by motion, plea, or answer filed, by the making of a stipulation therein; and no doubt in other ways", thus meaning affirmative action taken in the cause.

The broad attitude of the Federal courts tending to give emphasis to the intention of the party, to the substance rather than form, is stated in *Romaine* v. *Union Insurance Co.*, 1886, Cir., Ct. W.D. Tenn., 28 Fed. 625; at 638; "If a special appearance is desired, it seems to be accomplished by some mere statement of counsel that he so appears, or is left to implication from the steps he takes; and wherever the fact appears that he so limits his appearance, no matter how, no courts are

more liberal than the Federal Courts—and all are so—in giving effect to that intention, without regard to any technical requirement of the practice in that behalf. *Harkness* v. *Hyde*, 98 U.S. 476."

Petitioner therefore submits that this court should definitively determine the question herein presented, so as to establish a general rule of fundamental and necessary practice.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDMUND J. JOHNSON AND
E. R. BORGMEIER,
Attorneys for Petitioner.

E. R. BORGMEIER,
Of Counsel.

APPENDIX A

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 14675. October Term, 1955. April Session, 1956.

E. R. Borgmeier, also known as Eleanor B. Johnson,
Petitioner,
v.
Patrick T. Stone, as Judge of the United States District Court for the Western District of Wisconsin,
Respondent.

On Petition for Writ of Mandamus and Writ of Prohibition.

May 11, 1956.

Before Finnegan, Swaim and Schnackenberg, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* Pursuant to leave granted, petitioner has filed herein a petition for writ of mandamus and writ of prohibition directed to respondent. To that petition respondent has filed a "return", to which petitioner has filed a reply. All of these documents are verified. There does not appear to be any material disagreement as to the relevant facts.

Petitioner, a Chicago lawyer, on May 21, 1953, filed a civil action in the District Court of the United States for the Western District of Wisconsin, entitled *Helen N. Fleming, et al.* v. *Lake Delton Development Commpany, et al.*, bearing number 2465-Civil.

On November 22, 1954 petitioner filed a withdrawal as attorney for plaintiffs in the clerk's office of said court, pursuant to leave granted on November 3, 1954 by respondent.

On or about February 25, 1955, petitioner served upon defendants a notice of an attorney's lien claimed by her upon the cause of action involved in *Helen N. Fleming, et al.* v. *Lake Delton Development Company, et al.* and upon the proceeds or damages derived in said action, as security for her fees in the conduct of such litigation, pursuant to § 256.36 of Wisconsin Statutes (1953).

When the case of *Helen N. Fleming, et al.* v. *Lake Delton Development Company, et al.* was reached for trial on September 30, 1955, the parties agreed upon a settlement under the terms of which defendants were to pay $32,500 to plaintiffs by deposits with the clerk of the court as follows: $10,000 in 30 days; $10,000 in 60 days and $12,500 within one year. An order was entered by respondent on that date directing that petitioner be given notice of such settlement "so that she could take such steps as she might desire to enforce any lien which she might claim or assert to such funds." Two deposits of $10,000 each were made with the clerk by the defendants according to the agreement.

On November 9, 1955, respondent entered a rule directing petitioner to show cause why the moneys on deposit should not be distributed free of her lien, and directing that notice of the rule be served on her by the clerk by registered mail, returnable November 17, 1955. On the latter date respondent entered an order to the effect that due and sufficient service of said rule to show cause was served on petitioner and which order directed that the moneys on deposit[1] should be paid by the clerk to plaintiffs' attorney, free of any lien of petitioner.

Petitioner was not present when any of the aforesaid proceedings before respondent took place.

On December 14, 1955, she filed a notice of appeal to this court from the order of November 17, 1955, and also

1. Except a part thereof to be held to answer a garnishment proceeding against one of the plaintiffs.

in due time filed Designation of Contents, Statement of Points on Appeal, and Statement in accordance with Rule 10(b). She also presented a motion requesting that original reports of proceedings be included in the record for appeal, and thereafter forwarded true copies of necessary documents to be included by the clerk in the record, requesting the clerk to certify the record and forward it to her for filing in this court.

By order dated January 2, 1956 and entered January 4, 1956, respondent entererd a rule to show cause, returnable January 17, 1956, (continued on January 17, 1956 to January 31, 1956) which provided that,—"upon the failure of E. R. Borgmeier, Esquire, to submit herself to the jurisdiction of this Court for the determination of the validity of said alleged lien, or the merits of said lien rights, that the purported appeal taken by E. R. Borgmeier from the order entered on this Court on the 17th day of November, 1955, shall be dismissed upon its merits with prejudice, and further, that the alleged lien, and any lien rights arising thereunder, shall be dismissed with prejudice and the proceeds of the settlement disbursed to the plaintiffs free from any incumbrance of said alleged lien or any lien rights."

Petitioner forwarded to the clerk of the district court "for Judge Stone's consideration and signature," a motion and order to extend to February 20, 1956, the time within which to file record on appeal.

A motion for leave to file the petition now before us was filed in this court on January 30, 1956.

1. We have jurisdiction to issue extraordinary writs in aid of our appellate jurisdiction. Section 1651(a), Title 28 U. S. C. A. Our authority to issue such writs is that which may properly be deemed to be auxiliary to our appellate power. *United States* v. *Mayer*, 235 U. S. 55, 59 L. Ed. 129.

2. Petitioner has appealed from respondent's order of November 17, 1955 which directed the release of plaintiffs' moneys held by the clerk of the district court and upon which moneys petitioner then claimed an attorney's

lien under the statutory law of Wisconsin.[2] This order implicitly holds her lien to be ineffectual as to the moneys then in the hands of the clerks, and is, therefore, an appealable order.

3. Respondent contends that petitioner is not a party to the proceeding and, therefore, she has no right of appeal.[3] The district court recognized that she was a party to the proceeding by directing that notice be served upon her, and by finding that it had been served prior to the entry of the order of November 17, 1955. It is self-evident that when a fund upon which an attorney claims a statutory lien is being released from that lien, the attorney is a party to that proceeding and is entitled to appeal from an adverse order.

4. Respondent also argues that petitioner lost any right to appeal "by staying outside the jurisdiction". We have been cited to no authority holding that a party to a civil proceeding loses her right of appeal from an adverse decision simply because she is physically absent from the geographical jurisdiction of the court. We hold to the contrary.

5. After petitioner filed a notice of appeal on December 14, 1955, respondent had no jurisdiction to enter any orders in said case, except in pursuance of Rules 73, 75 and 76 of the Rules of Civil Procedure.[4] His aforesaid orders entered on January 4, 1956 and January 17, 1956 were entered without any authority and they should be expunged from the record.

Respondent in his return herein admits that petitioner filed the notice of appeal and the other documents as steps in perfecting her appeal. He further admits that "he declined to certify the record and instead issued an order" that she "consent to the jurisdiction" of the district court.

Respondent had no right to impose any such condition in this connection.

---

2. Wisconsin Statutes (1953), § 256.36.

3. "A party may appeal from a judgment by filing with the district court a notice of appeal." Rule 73(a), Rules of Civil Procedure.

4. 28 U. S. C. A., Rules 73, 75 and 76.

Except as hereinbefore set forth, we express no opinion as to petitioner's right to maintain the present appeal, or as to the merits thereof.

In accordance with the views herein set forth, a writ of prohibition will issue forthwith from this court directed to the respondent commanding him to desist from any further proceedings against petitioner in case No. 2465-Civil, entitled *Helen N. Fleming, et al.* v. *Lake Delton Development Company, et al.*, in the United States District Court for the Western District of Wisconsin, except as hereinafter provided, until the further order of this court; and, further, a writ of mandamus will issue forthwith directed to the respondent, commanding him to (a) expunge the orders entered by him on January 4, 1956 and January 17, 1956, in said case, (b) pass upon any motions addressed to him by petitioner and incidental to the perfection of her appeal and the filing in this court of the record thereon, and (c) direct the clerk of said district court, upon payment of his proper charges therefor, to authenticate said record when completed and forward it to petitioner for filing with the clerk of this court.

We reserve jurisdiction to pass upon any motion by petitioner for leave to file said authenticated record in the office of the clerk of this court.

Finnegan, *Circuit Judge*. I concur only to the following extent shown by my separate opinion. The order granting Borgmeier leave to file her petition for mandamus also stayed the proceedings in *Helen N. Fleming, et al.* v. *Lake Delton Development Company*, No. 2465 "until the final disposition of this petition." Our purported retention of jurisdiction, even for limited purposes, injects another difficulty into this case for anyone determining when and if Borgmeier's petition is finally disposed of. If the stay is extended we ought to say so in unequivocal language. I think the relief granted under the form of a writ of prohibition collides with our simultaneous command to the trial judge under which he must now "pass upon any motions addressed to him by petitioner and incidental to the perfection of her appeal and the filing in this court of the record therein." I would only direct certification

of the record and continue the stay of proceedings in No. 2465 until Borgmeier perfects her appeal and we dispose of it on the merits. This review could be expedited and dilatory tactics penalized. We need only remind the trial judge that he lost jurisdiction when the notice of appeal was filed, save as to the mechanical procedural matters he is now directed to perform.

I cannot join in an opinion or mandate forbidding this district judge to desist "from *any* further proceedings against (this) petitioner." Such a command subjugates the trial judge to the litigant.

APPENDIX B

241 Fed. 2nd 865

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11873 September Term 1956, January Session 1957

Helen N. Fleming, William J. Newman, Jr., Margaret N. Walsh, Richard P. Newman, Josephine N. Krug, Adelaide Loiacano, and William McKavis, a minor, by Helen N. Fleming, his next friend,
Plaintiffs-Appellees,
v.
Lake Delton Development Company, a Wisconsin Corporation, Ralph M. Hines, James H. Hill, Sr., Hilmer C. Amundson and Henry C. Titus,
Defendants-Appellees,
and
James H. Hill, Jr., Millie M. Risley, Frances Hines and A. B. Batty,
Impleaded Defendants-Appellees.
On Appeal of E. R. Borgmeier,
Respondent-Appellant.

On Appeal from order entered November 17, 1955, in the District Court for the Western District of Wisconsin.

February 26, 1957

Before Duffy, *Chief Judge*, Lindley and Swaim, *Circuit Judges.*

Lindley, *Circuit Judge.* Since the questions presented in this appeal involve facts many of which were related in our earlier decision in *Borgmeier* v. *Stone*, 233 F. 2d 815, we shall attempt to avoid unnecessary repetition. However, that opinion held merely that, after this appeal had been taken, the district court was without jurisdiction to enter further orders in the cause.

In this appeal appellant, a resident of Illinois, seeks to set aside an order entered November 17, 1955, wherein the district court in Wisconsin disposed of her claim for an attorney's lien upon $32,500 deposited as a result of settlement of the litigation, with the clerk of the court. She had been attorney for plaintiffs, but, by order of court, had withdrawn her appearance and was no longer counsel of record. However, she had served notice of a lien, as former attorney for plaintiffs, for $95,000 upon defendants. She had taken no action in court to prosecute or perfect her claim of lien upon the fund. In this situation the court directed that notice be given to her by registered mail to show cause why she should not appear and prosecute her claim for lien. This registered letter was returned by the postal service unopened, as a result of inability to find her at her last known address, or to deliver the letter personally. Thereupon the court held that it had jurisdiction of appellant by virtue of these facts, and, on November 17, 1955, directed that $20,000 of the fund be released and delivered by the clerk to plaintiffs, appellant's former clients, without regard to the latter's claim of lien. From that order this appeal was taken.

It is clear that the court had no jurisdiction of the person of appellant, even though the fund was in its custody. She might have been served, as provided by the Rules of Federal Procedure, as an attorney, prior to her withdrawal as counsel for the plaintiffs, but, after that, she could no longer be reached by such notice. Consequently, the question is presented as to whether the court acquired jurisdiction of her or her rights by virtue of the returned registered mail notice.

When appellant notified defendants of her claim for lien, she might have filed it as an interpleader in the cause. This she did not do. The defendants, having been served with notice of lien, could only at their peril dispose of

the fund upon which they had been notified she claimed a lien. They might have brought her in as a party claiming an interest in the fund with proper service; and plaintiffs likewise might have made her a party and had her served as one interested. Furthermore, defendants might have filed a suit of interpleader against both plaintiffs and appellant, as a stake holder of the fund, requesting the court to determine the rights and interests of all parties. This they did not do. Again, plaintiffs might have invoked the provisions of 28 U.S.C., § 1655, which provides that a suitor may file in the district court a suit to establish a lien upon, or to remove clouds from, the title to property within the district and that the court, having jurisdiction of the *res* may acquire jurisdiction by giving notice to a non-resident for the purpose of determining such interest, if any he has, in the *res*. To obtain jurisdiction in such matters, it is necessary that the court have jurisdiction of the *res* and that notice be given to non-resident claimants in the specific manner and form there provided. However, there was no attempt by plaintiffs, defendants or appellant to invoke any of these remedies or follow any of these procedures. Instead, the court ordered a notice sent to her in a manner not provided by statute or rules, and, by an order of which she was not notified, freed $20,000 of the fund from her claim of lien and ordered it paid to plaintiffs. This, we think, was beyond the court's jurisdiction. In view of the further fact that appellant had never filed any petition for relief in court, her alleged interest in the fund was in nowise before the court; as a consequence, the order is void. No court may properly subject a person to its jurisdiction by merely notifying him by an undelivered letter directing him to come to court, in the absence of statutory basis for such procedure.

However, it appears that, subsequent to the entry of the order of which complaint is made, on December 21, 1955, plaintiff filed with the clerk of the district court her claim for lien upon the fund. Of course, the jurisdiction of the court based thereon must date from the day of the filing and not from something that happened before she became a party.

Inasmuch as appellant has now sought the aid of the court, and as the court has acquired jurisdiction both of the subject matter and of her person, it now has full authority to entertain and adjudicate her claim. Whether issues have been drawn by way of answer or otherwise, we do not know, but, obviously, the court will afford all interested parties opportunity to contest the legality of her claim.

We do not pass upon the validity of the claim. As the merits have never been presented, they are beyond the purview of this disposition.

The order of November 17, 1955, from which the appeal is taken, is declared void and vacated and the cause remanded to the district court with directions to proceed to determine the merits of appellant's claim for lien after the issues pertaining thereto have been properly joined.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Wednesday, March 27, 1957

Before

Hon. F. Ryan Duffy, Chief Judge

Hon. Walter C. Lindley, Circuit Judge

Hon. H. Nathan Swaim, Circuit Judge

Helen N. Fleming, et al., Plaintiffs, vs. Lake Delton Development Company, et al., Defendants, and James H. Hill, Jr., et al., Impleaded Defendants. E. R. Borgmeier, Respondent-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin.
No. 11873	

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

(Envelope of the Clerk, United States Court of Appeals, for the Seventh Circuit, 1212 Lake Shore Drive, Chicago 10, Official Business, addressed to Mrs. E. R. Borgmeier, 500 Illinois Street, Lemont, Illinois, bearing U. S. Postal cancellation stamp, Chicago, Ill., Mar. 27, 1957, 7 PM.)

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Tuesday, April 2, 1957

Before

Hon. Walter C. Lindley, Circuit Judge

Helen N. Fleming, et al., Plaintiffs. vs. Lake Delton Development Company, et al., Defendants, and James H. Hill, Jr., et al., Impleaded Defendants. E. R. Borgmeier, Respondent-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin.

No. 11873

On motion of E. R. Borgmeier, Respondent-Appellant, pro se, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby stayed, pursuant to the provisions of Rule 28 of the Rules of this Court.

(Envelope of the Clerk, United States Court of Appeals, for the Seventh Circuit, 1212 Lake Shore Drive, Chicago 10, Official Business, addressed to Mrs. E. R. Borgmeier, 500 Illinois Street, Lemont, Illinois, bearing U. S. Postal cancellation stamp, Chicago, Ill., Apr. 2, 1957, 7 PM.)

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1104

E. R. BORGMEIER,

Petitioner,

vs.

HELEN N. FLEMING, WILLIAM J. NEWMAN, JR., MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOIACANO AND WILLIAM McKAVIS, A MINOR, BY HELEN N. FLEMING, HIS NEXT FRIEND,

Respondents,

LAKE DELTON DEVELOPMENT COMPANY, A WISCONSIN CORPORATION, RALPH M. HINES, JAMES H. HILL, SR., HILMER C. AMUNDSON AND HENRY C. TITUS,

Respondents,

AND

JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES AND A. B. BATTY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANK M. COYNE,
Attorney for Plaintiffs-Respondents,

ARTHUR WICKHAM,
Attorney for Lake Delton Development Company, Ralph M. Hines, James H. Hill, Sr., and Henry C. Titus, Defendants-Respondents, and James H. Hill, Jr., Interpleaded Defendant, Respondent, and

RAY M. STROUD,
1 W. Main Street, Madison, Wisconsin,
Attorneys of Record for All Above Named Respondents.

THE DUNHOFF-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 1104.

E. R. BORGMEIER,

Petitioner,

vs.

HELEN N. FLEMING, WILLIAM J. NEWMAN, JR., MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOIACANO AND WILLIAM MCKAVIS, A MINOR, BY HELEN N. FLEMING, HIS NEXT FRIEND,

Respondents,

LAKE DELTON DEVELOPMENT COMPANY, A Wisconsin Corporation, RALPH M. HINES, JAMES H. HILL, SR., HILMER C. AMUNDSON AND HENRY C. TITUS,

Respondents,

AND

JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES AND A. B. BATTY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ORDER AND OPINION BELOW

Because of petitioner's failure and refusal to offer any evidence to support her claim for an alleged attorney's lien, the United States District Court ordered that funds deposited by defendants with the clerk of court be paid

to aid for and on behalf of the plaintiffs." On petitioner's appeal the Court of Appeals directed that the cause be remanded "with directions to proceed to determining the merits of appellant's claim for lien after the issues pertaining thereto have been properly joined." (Appendix B, p. 10a.) Thereafter this petition was filed.

QUESTIONS PRESENTED

I. Should this Court in the exercise of its discretion grant the writ because:

a. There has been a showing of the required "imperative public importance" and thus, although no judgment has been rendered by the Court of Appeals, the matter under Rule 20 is such as "to require immediate settlement in this Court"?

b. There are "special and important reasons," as required by Rule 19, for the issuance of the writ?

c. Some of the instances mentioned in Rule 19, 1(b) here exist?

II. Did petitioner by filing her lien in the District Court and by taking her appeal, which could be perfected only by a party, thereby appear and subject herself to the jurisdiction of the court?

ADDITIONAL STATEMENT

The defendants-respondents and the interpleaded defendant-respondent, James H. Hill, Jr., were served with copies of petitioner's lien. (Pet., p. 3a.) But to protect themselves they caused to be inserted in the stipulation for settlement a provision that the payments to be made by them be paid to the clerk of court. (R. 70.) Prompt notice of the settlement was given petitioner. (R. 73.) It is undisputed that petitioner, although advised as to deposits with the clerk, did nothing to prove or protect her alleged lien, until she filed it with the clerk on December 13, 1955. (Pet., p. 2a.)

The plaintiffs-respondents take the position that petitioner had no lien. (R. 131, 132.) Their position is also that if she ever had a lien, such was lost or waived by reason of her abandonment of the litigation and her refusal to prosecute the claim. (R. 81, 126.) So far as any retaining lien may be concerned their position is that she exercised this lien right and retained all such papers as came into her possession (R. 22, 26, 43, 69), and that by reason thereof such is not a matter involved herein. Petitioner claims also that she has a lien by reason of the provisions of the Wisconsin statutes, section 256.362. (Pet., p. 11.) Such is also disputed. The court of appeals in directing the district court "to proceed to determine the merits of appellant's claims" (Appendix B, p. 10a) probably contemplated that the issues then to be framed should cover the questions as to whether the statute makes provision for such an alleged lien, as to what was the reasonable value of petitioner's services, as to whether there was in fact any such lien and, if so, as to whether it was waived or abandoned.

ARGUMENT.

WRIT OF CERTIORARI MAY BE REFUSED PURSUANT TO RULE 20. NO JUDGMENT OF COURT OF APPEALS HAS BEEN RENDERED AND CASE IS NOT OF REQUIRED "IMPERATIVE PUBLIC IMPORTANCE."

Rule 20 of this court (omitting citations there set forth) provides:

> "*Certiorari to a court of appeals before judgment.* A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

The court of appeals (241 F. 2d 865, 867, Appendix B, p. 10a) set forth in its mandate as follows:

> "The order of November 17, 1955, from which the appeal is taken, is declared void and vacated and the cause remanded to the district court with directions to proceed to determine the merits of appellant's claim for lien after the issues pertaining thereto have been properly joined."

The court in this connection may be interested in examining *Cleveland C. C. & St. L. Ry. Co.* v. *Henry Admx.*, 290 U. S. 627, and *Bruce, Admr., et al.* v. *Tobin*, 245 U. S. 18. In each, a petition for a writ of certiorari to a state court was denied for want of a final judgment. In the *Henry* case a new trial had been ordered by the Supreme Court of Missouri. In the *Bruce* case a new trial had been ordered by the Supreme Court of South Dakota. It is true that in these actions it was necessary in order for a writ of certiorari to be granted that a final judgment be

entered. In the matter at bar, however, there was no judgment whatsoever, either final or otherwise. The cause was remanded for trial.

There furthermore has been no "showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." Petitioner's claim that she had a lien on the funds deposited with the clerk of the district court is certainly not a matter of "imperative public importance" such as justified the issuance of writs of certiorari in the decisions set forth in said rule. See particularly *United States* v. *Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; and *United States* v. *United Mine Workers*, 330 U. S. 258.

RULE 19 UNDER FACTS SET FORTH IN PETITION AFFORDS NO PROPER BASIS FOR ISSUANCE OF WRIT.

Section 1 of this rule in part reads:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:"

Instances are then set forth when the writ may be issued.

Petitioner does not state what are the "special and important reasons" for the issuance of the writ or as to why this court in its "sound judicial discretion" should take such action at this stage of the litigation. An attempt rather is made to bring the matter within some of the instances where possibly a writ may be granted. It thus may be advisable to comment on such instances as are

mentioned in Rule 19, 1(b) and are mentioned in the petition.

If it is assumed that the writ should be issued considering only the provisions subsection (b) of Section 1 of the rule, there is, we submit, grave doubt as to whether any proper showing has been made. Purported reasons are set forth at various places throughout the petition. It is claimed (Pet., p. 17) that the court of appeals found that the trial court did not have jurisdiction, but then remanded the cause to determine the merits as to petitioner's attorney's lien. When petitioner states that the court of appeals found that the trial court did not have jurisdiction, she was undoubtedly referring to the decision on her application for writs of mandamus and prohibition. Such decision was, of course, not binding upon the defendants. They were not parties to that proceeding and were not even permitted to file a brief *amicus curiae*. Certainly the second decision indicated conclusively that the court of appeals was of the opinion that it did have jurisdiction.

In any event, such is not one of the reasons enumerated in subsection (b) of Rule 19.

It is contended also (Pet., p. 21) that the remanding for a trial upon the merits before Judge Stone, "in view of his repeated conduct in suppressing said lien, in view of petitioner's continuous insistence on her jurisdictional claims, and her refusal to waive the same, brings the cause within the supervisory provisions of Rule 19 (b)." This is not one of the reasons set forth in this subsection. Judge Stone's position was unquestionably that petitioner should be afforded every opportunity of litigating her claimed lien and further that the matter should be disposed of without any further undue delay. The papers and documents which petitioner examined pursuant to the court's order covered a period from 1926 to 1943. (Pet., p. 6.) A complaint was filed on May 21, 1953. (Pet., p. 3.) An examination of the

original complaint will indicate that it was based upon a resulting trust. When, however, petitioner was advised that the applicable Wisconsin statute enacted over ninety years prior to the institution of the action had outlawed resulting trusts, she then with his consent amended her complaint to make claim upon a constructive trust claimed to arise because of fraud of the defendants. It is admitted in the petition (p. 4) that the conveyances to the defendant company were in accordance with an order of the United States District Court of the Northern District of Illinois, Eastern Division, in the bankruptcy proceeding involving the father of some of the plaintiffs and the grandfather of some of the others. This is material because had the defendants or any of them been confidential employees of plaintiffs' said ancestor insofar as this sale was concerned or had the defendant company been his "solely-owned" corporation, or had he any interest therein, Judge Holly, who made the order for the conveyances, would certainly not have taken any such action. It is said also that petitioner was compelled to attend numerous pre-trial examinations at Madison and Baraboo (Pet., p. 5), but they were all depositions which petitioner conducted. (R. 108.) There were no depositions taken by the defendants. It is also set forth in the petition (p. 6) that petitioner was discharged prior to October 21, 1954. Whether she was discharged or not, there had been no steps taken to bring the action on for trial for a period of over sixteen months. The situation was certainly one where these ancient transactions carried on under the supervision of the United States District Court in the bankruptcy proceeding should have been disposed of without undue delay. The defendants, like other people, do not live forever, and it was necessary that they be permitted to testify. As a matter of fact, the defendant Amundson is now dead; the interpleaded defendant, A. B. Batty, whom petitioner caused to be made an interpleaded

defendant, is also dead. It requires no stretch of the imagination to understand as to why defendants under such circumstances and because of the age and condition of other defendants finally agreed to pay the sum of $32,500.00. But during all of these transactions there was no possible basis for claiming that Judge Stone was acting improperly and in fact was not granting every request she made.

When defendants insisted that the money which was to be paid in settlement should be paid to the clerk of the court and such provision was set forth in the settlement agreement, such was done pursuant to authorities set forth in an annotation at 117 A. L. R. 983. It was done for the purpose of affording petitioner the opportunity of making claim for the amounts said to be due her and of enforcing her alleged lien. This settlement incidentally was not made until after the case had been called for trial and was twenty-eight months after the complaint prepared by petitioner had been filed by her. (Pet., p. 9.)

Petitioner admits that she received notice that she "may take such steps as she may desire to enforce any lien which she may claim or assert herein." (Pet., p. 9.) This notice was given promptly. (R. 412.) Petitioner refused to do anything to assert her alleged lien. Steps were taken for the purpose of having her appear and show cause as to why there should not be an adjudication with respect to her claim in this regard. There has never been any contention made by or on behalf of petitioner that she was not actually advised as to what the situation was in this regard. Her claim is rather that the notice mailed by the clerk of the district court, which was sent to her at her then residence by registered mail, was never actually received by her. (Pet., p. 16.) The situation is unusual in that the trial court was attempting repeatedly to prevail upon her to assert any lien, if she had one, but she on the other hand was doing everything to stay out of court ex-

cept on certain occasions to enter her special appearances. The record in fact indicates that the trial court apparently was more concerned about protecting petitioner's rights than she was herself. In any event, the remanding of the matter for trial to Judge Stone is, we submit, not a reason for the issuance of the writ pursuant to subsection (b).

It is further claimed that "the court of appeals has also chosen to ignore its own statements appearing at pages 2 and 3 of its opinion here * * *." Petitioner is undoubtedly referring to the first decision, that rendered on her application for a writ of mandamus and a writ of prohibition. Defendants, however, were not a party to such proceeding and, as above set forth, were not even permitted to file a brief *amicus curiae*. In any event, such is not one of the instances covered by subsection (b) of Rule 19.

There are, however, matters set forth in the petition which might seem to be covered by subsection (b). It is claimed (Pet., p. 16) that the court of appeals has "chosen to ignore the statutory requirements and practice of the State of Wisconsin." The only Wisconsin decision which petitioner cites in support of this proposition is *State ex rel. Cronkhite v. Belden*, 193 Wis. 145, 211 N. W. 916. This decision involved the validity of service upon a nonresident motorist. He had been ordered to appear before a master in the State of Illinois. It was claimed that his appearance there constituted a general appearance in an action instituted in Wisconsin. The court held that such appearance before the Illinois master was not a general appearance in the Wisconsin action. The sentence quoted on page 26 of the petition was a statement made with respect to such contention. That the court did not intend to limit the instances in which there could be a general appearance is indicated by the phrase, that such could be made "no doubt in other ways." The court held, as indicated by the fol

lowing statement, which is set forth immediately following the sentence quoted in the petition, "here the appearance was not in the action and did not amount to a general appearance."

The "other ways" in which there may be a general appearance are rather numerous. Of interest in this connection is the decision in *Bestor v. Inter-County Fair*, 135 Wis. 339, 115 N. W. 809. The following statement is set forth at page 341:

> "The mere fact that the defendant stated that he appeared specially to object to the jurisdiction of the court will not protect him from the consequences of a general appearance, if the proceedings taken by him show that he appeared for any purpose consistent with jurisdiction. In the case before us the defendant moved the court to amend the return of the officer to the summons to conform to the facts. This motion was inconsistent with want of jurisdiction of the court over the person of defendant. The court could not grant the motion without jurisdiction of the person and the subject matter. The asking of the relief prayed for in the motion, whether granted or not, was a submission by defendant to the jurisdiction of the court and a waiver of all jurisdictional defects. We are therefore of opinion that the motion to amend the return and process of the court amounted to a general appearance in the action."

In view of petitioner's appeal, the following statement in *Rix v. Sprague C. M. Co.*, 157 Wis. 572, 147 N. W. 1001, at page 573, is likewise of interest:

> "* * * an appeal from a judgment constitutes a general appearance. *Barnum v. Fitzpatrick*, 11 Wis. 81; *Ruthe v. G. B. & M. R. Co.*, 37 Wis. 344; *Washburn v. Washburn W. Co.*, 120 Wis. 575, 98 N. W. 539."

It is claimed also (Pet., p. 16) that the court of appeals "has chosen to ignore the practice sanctioned by this court * * *." This contention might more expeditiously be con-

cred under the following heading and will be commented upon there. In any event, petitioner has not shown "special and important reasons" for the issuance of the writ and also has totally disregarded the provisions of Rule 20 of this court.

PETITION BY FILING HER LIEN BECAME A PARTY TO THE ACTION.

The filing of a claim for an attorney's lien constitutes, we believe, a general appearance. In *Alexander* v. *Hillman*, 296 U. S. 222, 80 L. Ed. 192, 56 S. Ct. 204, claims were filed by nonresident individuals in a suit where the court had appointed receivers. In response to the claims the receivers filed in the same court an ancillary bill in which they set up counterclaims for the value of assets claimed to have been fraudulently converted by these claimants. Upon being served by mail with copies of the ancillary bill and an order directing them to plead, claimants appeared specially and moved to quash. This court, however, held that the trial court had jurisdiction of these nonresident claimants. The following statement appears at page 241:

> "By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance, § 51 to the contrary notwithstanding. See *General Electric Co.* v. *Marcel Co.*, 287 U. S. 430, 435."

It would not seem to be necessary, as stated in the petition (p. 16), that there be any motion to file a lien. The two authorities there set forth, *Central R. & Banking Co. of Georgia* v. *Pettus*, 113 U. S. 116, and *Patrick* v. *Leach*, 17 Fed. 476, do not hold that there must be a motion or any other formality with respect to the filing of a lien. No reason, furthermore, is suggested as to why there should be any such formality.

It cannot seriously be doubted that the filing in this instance was for the purpose of setting forth what petitioner's lien was so that no action adverse to her could be taken with respect to such claimed lien. The record was already clear and conclusive that she had made claim for an attorney's lien. Such was recognized at the time of the settlement effected, whereby notice was to be given to her so that she "may take such steps as she may desire to enforce any lien which she may claim or assert herein." (Pet., p. 9). That she asserted a lien is also indicated by the order from which petitioner perfected her appeal dated November 17, 1955. It provided that the sums deposited with the court were to be "released to the plaintiffs through their attorneys free from any lien of Attorney Eleanor Borgmeier, Esq.". (Pet., p. 40.).

That the petitioner should not be heard to say that she was not a party to the appeal and thus that the court did not have jurisdiction of her is indicated by the very fact that she perfected an appeal. Rule 73 (a) of the Federal Rules of Civil Procedure in part provides:

> "A party may appeal from a judgment by filing with the district court a notice of appeal."

It is stated in Moore's Federal Practice, Vol. 7, page 3126, Sec. 73.04:

> "The first sentence in the second paragraph of amended Rule 73(a) provides that 'A *party* may appeal from a judgment by filing with the district court a notice of appeal.'
>
> "Only a person who has become a party in the court below and who is aggrieved by the judgment or order can appeal therefrom."

Petitioner insisted that she be permitted to appeal. Although Judge Stone was apparently of the opinion that she had no right to do so and took what steps he could to

prevail upon her to prove her claim, she obtained from the Court of Appeals a Writ of Mandamus and a Writ of Prohibition and was thus allowed to appeal, *Borgmeyer v. Stone*, as Judge etc., 233 F. 2d 818. As a result of her own action, she assumed the position of a party. Under such circumstance, it would seem that she could not now be heard to say that she was not a party or that the court did not have jurisdiction over her person. Thus irrespective of the filing by her of her lien, which could have been done only for the purpose of asking the court to protect her rights with respect to it, the District Court; we submit, should be permitted to pass on the merits of her claim and terminate the protracted litigation.

CONCLUSION.

For the above reasons the petition may properly and should be denied.

Respectfully submitted,

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